Supreme Court, U.S.
FILED

No. 09-730 DEC 17 2009

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In The

Supreme Court of the United States

KEVIN C. HOLTZER,

Petitioner,

v.

BARRY DAVIS, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner is serving a mandatory, non-parolable life sentence, or "death in prison." On federal habeas review he argued that his state postconviction issues, which were not run on direct review, should not be procedurally defaulted, because they pertain directly to the core question of guilt or innocence, and because direct appeal counsel was ineffective. Did the Sixth Circuit err in refusing to grant a certificate of appealability under these circumstances?

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REFERENCE TO DECISIONS BELOW

The March 11, 2009 Opinion and Order of the United States District Court for the Western District of Michigan is unpublished (Case no. 2:06-cv-169; 2009 WL 723881). The October 7, 2009 Order of the United States Court of Appeals for the Sixth Circuit denying a certificate of appealability is unpublished (Case no. 09-1411). Both of these decisions are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the October 7, 2009 dispositive order of the United States Court of Appeals for the Sixth Circuit denying his certificate of appealability. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2253:

(a) In a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment

or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under § 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner, Kevin Holtzer, filed his Petition for Writ of Habeas Corpus in the Federal District Court for the Western District of Michigan on June 6, 2006. Federal jurisdiction for this filing was under 28 U.S.C. § 2254. Mr. Holtzer's petition asserted that he was denied the right to counsel under the Sixth Amendment to the United States Constitution,

through the ineffectiveness of his trial counsel, was denied due process of law through trial counsel's failure to explore and present available defenses, was denied due process of law through the prosecutor's egregious and repeated misconduct, was denied due process of law and his right to a fair trial through admission of unsound science to reach critical and inaccurate conclusions, and was denied the effective assistance of counsel on direct appeal where significant and obvious critical issues were neglected.[1]

On March 11, 2009, the district court issued an Opinion and Order Approving Magistrate Judge's Report and Recommendation (to deny the writ), and a Judgment dismissing Mr. Holtzer's petition, and denying a Certificate of Appealability as to all issues raised.

On October 7, 2009, the United States Court of Appeals for the Sixth Circuit issued an Order denying Petitioner's request for a certificate of appealability.

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[1] Petitioner also filed an issue concerning the standard of review under the AEDPA but did not seek a certificate of appealability as to that issue.

ARGUMENT FOR GRANTING THE WRIT

Petitioner Holtzer has been Sentenced by a Michigan State Court to Mandatory Non-Parolable Life, or "Death in Prison." Due to Ineffective Assistance of Direct Appeal Counsel, Petitioner did Not Raise Critical Outcome Determinative Issues on Direct Appeal. These Issues Were Raised in State Post-conviction, and Procedurally Defaulted. Because These Procedurally Defaulted Issues Pertain Directly to the Core Question of Guilt or Innocence, and Because Petitioner Has a Debatable Argument that Ineffective Assistance of Direct Appeal Counsel Should Constitute Cause to Overcome any Procedural Default, Petitioner Asserts it was Error to Deny a Certificate of Appealability, and Asks this Court to Remand for Review by the Sixth Circuit.

The question for the Sixth Circuit in assessing whether to grant a certificate of appealability was not whether Mr. Holtzer could prevail, but whether Mr. Holtzer had raised issues which were within the realm of judicial debatability to the extent that a certificate of appealability should have been granted.

In *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), this Court set forth the standard governing issuance of a certificate as probable cause. A habeas corpus

petitioner appealing from the denial of a § 2254 petition had to make "a substantial showing of the denial of a federal right" to obtain a certificate of probable cause.

The *Barefoot* standard was codified in Section 102 of the Antiterrorist and Effective Death Penalty Act of 1996. The key provision states that an appeal may not be taken unless the court issues a certificate of appealability (COA) in habeas proceedings arising out of state court convictions. The COA shall issue only if the application has made a substantial showing of the denial of a constitutional right, and the certificate should indicate which specific issue or issues satisfy the required showing. 28 U.S.C. § 2253(c).

The standard for issuance of a certificate of appealability and for a certificate of probable cause are the same. See *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("by enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed [the *Barefoot* standard]"); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). See also *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997). The new law states that certificates may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

In *Miller-El*, Justice Kennedy (writing for the Court) again stressed that the COA process is a gateway process which was never intended to be a

"ruling on the merits of petitioner's claim." *Id.* at 331. Under the prevailing standard, a petition must "show that reasonable jurists could debate whether (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack*, 529 U.S. at 484).

The *Miller-El* Court went on to note that "the threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336. In fact this Court affirmatively noted that § 2253 forbids it. "When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifies its denial of a certificate of appealability based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336-37. The *Miller-El* Court went on to note:

> "[O]ur opinion in *Slack* held that a certificate of appealability does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a certificate of appealability merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a certificate of appealability will issue in some

> instances where there is no certainty of ultimate relief. After all, when a certificate of appealability is sought, the prisoner 'has already failed in that endeavor.'" *Id.* at 337 (quoting *Barefoot*, at 893 n.4).

The *Miller-El* Court overruled the Fifth Circuit's refusal to grant the COA. "We do not require petitioner to prove, before the issuance of a certificate of appealability, that some jurists would grant the petition for habeas corpus." *Id.* at 338. In fact the Court stated that in some cases, the law required the issuance of a certificate of appealability even though "every jurist of reason might agree" after plenary consideration that the petitioner will not prevail.

The *Barefoot* Court approved the following remarks from an earlier Georgia federal case: "obviously, the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner." 463 U.S. at 893, fn. 4. Thus, in defining the substantial showing standard, this Court instructed that lower federal courts may not deny applications for probable cause certificates solely because they have already denied the petitions on the merits.

A leading habeas commentator has urged that the COA should be granted if the appeal presents questions of substance, i.e., at least one issue that is "debatable among jurists of reason; that a court could resolve in a different manner, that is adequate to

deserve encouragement to proceed further; that is not squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." See 2 Liebman, Federal Habeas Corpus Practice and Procedure (5th Ed.) § 35.4b, p. 1076-77. Mr. Holtzer meets this standard. As the *Barefoot* Court noted: "A court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous." 463 U.S. at 894.

Where a certificate of appealability has been denied on procedural grounds, a petitioner must show not only that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, but also that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Jimenez v. Quarterman*, __ U.S. __; 129 S. Ct. 681, 684, fn. 3 (2009), citing *Slack, supra* at 473. Petitioner asserts that he has made this dual showing, and notes that this Court has not hesitated to reverse COA denials when, as here, such action is appropriate. *Webster v. Cooper*, __ U.S. __ (No. 08-10314; 2009 WL 4111159, decided November 30, 2009); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Roper v. Weaver*, 550 U.S. 598, 604 (2007) (Scalia, J., dissenting).[2]

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[2] While Justice Scalia, in dissent, focuses on capital cases as deserving of special scrutiny with respect to a COA denial, it

(Continued on following page)

Mr. Holtzer continues to serve his non-parolable life sentence while this petition is pending; his purpose is not to "harass," but to obtain a ruling on his federal constitutional claims. The screening process is designed to prevent undebatable claims from being appealed. The standards for the issuance of a certificate of appealability are met with respect to the following issues for the reasons stated, *infra*.

ISSUE I – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Each of the issues presented by Mr. Holtzer are primarily fact driven, and the IAC issue is no exception.[3] In this case Petitioner Holtzer argues that

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should be pointed out that Petitioner Holtzer is serving Michigan's most severe sentence, mandatory, non-parolable life, often termed "death in prison."

[3] Due to the import of the facts it is important for Petitioner to respond to the repeated claims of the district court, in its March 11, 2009 Opinion and Order, that Petitioner misrepresented the record below. Initially, at p. 1 of its Opinion and Order, the district court chides Petitioner for claiming "it was inappropriate" or "error" for the magistrate to rely on the fact statement issued by the Michigan Court of Appeals in this case in 2003. A review of Petitioner's objections to the magistrate judge's R & R will show that such an argument was never made. Petitioner merely pointed out that the issues being considered by the Michigan appellate court were not the issues being raised on habeas. The district court, at p. 2 of its Opinion and Order, asserted that Petitioner "misrepresents the trial court's decision" in claiming that the state trial court found good cause for failing to raise the issues currently put forward on direct appeal because they lacked merit, and thus focused on the prejudice

(Continued on following page)

he was denied the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution, and his due process right to a fair trial under the Fifth and Fourteenth Amendments, where trial counsel was not prepared for trial, and made several, outcome-determinative preparatory errors. Trial counsel failed to adequately prepare and put forward a substantial defense by not dealing with hair transference issues, and by not properly assessing the "blood" evidence purporting to link Petitioner to the assault. The failure to bring in a qualified criminalist for the defense to counter the presence of three hairs (two claimed to belong to Petitioner Holtzer allegedly found in the room where the deceased's body was found and one claimed to belong to the deceased allegedly found in Holtzer's condominium unit) was critical.

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aspects. However, Petitioner merely quoted the state trial court directly. The fact that the state trial court demonstrated a misunderstanding of the cause and prejudice standard for overcoming procedural default does not support an accusation of misrepresentation when Petitioner clearly noted that the state trial court's ruling was grounded in "lack of merit in issues raised." Finally, the district court, without pointing to any particular language used by Petitioner, and without reference to any particular part of the record, charged that Petitioner "consistently misrepresented the testimony and record in this case" with respect to the blood/luminol issue. Contrary to the district court's assertion, Petitioner is not arguing that the prosecutor claimed luminol testing was conclusive for blood, but that the prosecutor repeatedly argued blood was present without sufficient basis in the record.

As fully detailed in the brief in support of Petitioner Holtzer's original habeas petition, included in the appendix, these preparatory and investigatory failures led to a failure to put forward a critical defense expert, and an inability to appropriately challenge the prosecution's proofs. Trial defense counsel was also ineffective for failing to object to prosecutorial misconduct and to the introduction of junk science in the form of luminol "blood" evidence.

The federal magistrate judge's Report and Recommendation, adopted by the district court, improperly defaults this issue, claiming that cause is not established through ineffective assistance of direct appeal counsel as the issue holds no merit. The lack of merit is premised, initially, on the claim that presentation of Petitioner's expert in relation to hair transfer evidence would "have added little, if any, value to the defense." The magistrate judge also found that the luminol/blood issues were dealt with through cross examination.

Petitioner urges that these conclusions are surely debatable by reasonable jurists after a close look at the record in this case. Petitioner urges this Court to fully review the detailed fact statement and the statement of this issue in the brief supporting his original habeas petition, attached in the appendix. The full record will conclusively establish that the prosecution was able to use the presence of three hairs at various locations, and the improper claim that blood evidence tied Petitioner to the crime, to base this conviction. There was no other convincing

evidence in this case. And a qualified expert, as shown by the report appended to Petitioner's original habeas brief as Appendix C, and included in the appendix to this petition, would have been able to demonstrate to the jury that the "blood" evidence was misstated and prejudicially exaggerated, and the hair evidence, given the transference issues in this case, was completely lacking in probative value.

A certificate of appealability should have been granted by the Sixth Circuit as to this issue.

ISSUE II – PROSECUTORIAL MISCONDUCT

As a second ground for relief Petitioner argued that his due process right to a fair trial under the Fifth and Fourteenth Amendments was denied when the prosecutor committed egregious misconduct by improperly claiming, with no basis in the evidence, that luminol testing revealed the victim's blood throughout the Petitioner's condominium unit, and that Petitioner tracked the victim's blood back to his unit from the crime scene. Other clear prosecutorial misconduct occurred when the prosecutor testified to critical facts not in evidence, and elicited the fact that Petitioner Holtzer was silent at arrest. Fact misstatements in relation to this issue by the state trial court constitute an independent ground for grant of the writ under 28 U.S.C. § 2254(d)(2).

The federal magistrate judge, affirmed by the federal district judge, defaulted Petitioner's prosecutorial misconduct issue, again finding no merit,

because, as to the blood statements, it was claimed the prosecutor did not overstate the issue, as he simply argued the evidence supported his conclusion that blood was present. The magistrate judge, like the state trial judge, misses the point here when he states, at p. 9 of the Report and Recommendation, that:

> "Defense counsel did a very good job of showing that the luminol testing could not conclusively indicate blood, **but the testimony did establish that luminol could indicate the presence of blood**. In fact, **the prosecutor argued that blood was found in petitioner's condominium based upon luminol testing**, which the prosecutor admitted was not conclusive. . . . Similarly the prosecutor never stated with certainty that there existed a blood pattern of footsteps leading to petitioner's condominium unit, **but simply argued the evidence supported such a conclusion**."

The highlighted sections of the magistrate's Report and Recommendation exhibit a lack of understanding of the science of luminol testing, and of the import of Petitioner's argument here. Luminol, without follow up testing, which was never done here, simply **cannot** indicate the presence of blood, and therefore the prosecutor's argument that blood was found in Petitioner's condominium based on the luminol testing was wrong, highly improper, and extremely prejudicial.

The crux of this issue is whether the prosecutor at trial exaggerated the impact of the luminol "evidence" in this case. The district court improperly claimed that Petitioner misstated the record because the prosecutor at trial only suggested luminol was presumptive for blood:

> " . . . Petitioner has consistently misrepresented the testimony and record in this case. Petitioner argues that luminol testing does not indicate the presence of blood. Petitioner cannot point to any testimony that indicates that luminol testing was conclusive for blood. Petitioner wants the court to imply that the prosecutor was making that claim." Opinion and Order, p. 2.

Petitioner asserts that the record supports his claims in this regard, as detailed in his fully documented fact statement in the original brief in support of the habeas petition, included in the appendix to this petition, and would urge this Court to fully review the facts. As an example, at p. 7 of that brief, Petitioner points directly to the prosecutor's opening argument statement that "[o]n that brown rug Connie Swander obtained a glow from the Luminol, **indicating that blood was there**, couldn't see it, but the Luminol glowed." (T 10/11/99 189-190, emphasis added). In closing argument the state trial prosecutor told the jury that **"the Luminol glows only where there's blood."** (T 10/21/99 26-28). Certainly this is pointing to claims by the trial prosecutor that luminol testing was conclusive for

blood. And this strongly indicates that the prosecutorial misconduct on this critical point is an issue that is debatable among reasonable jurists. Again, Petitioner would refer to the detailed fact statement, Issue II, and the expert report at Appendix C, of his previously filed brief, included in the appendix to this petition.

Petitioner also urges the debatability of the other components of his prosecutorial misconduct argument (unsupported and improper claim that pubic hairs came from Darlene Wilson, and unconstitutional reference to Petitioner's silence, failure to turn himself in, and failure to question his own guilt). Given the paucity of convicting evidence, and the limited probative value of the evidence that was admitted, these constitutionally improper arguments by the prosecutor must be seen as outcome determinative. Petitioner would again urge this Court to examine the detail on these issues, fully documented with record references, in the previously filed supporting brief.

Petitioner Holtzer urges that a certificate of appealability should have been granted by the Sixth Circuit with respect to the prosecutorial misconduct argument.

ISSUE III – DUE PROCESS DENIED THROUGH JUNK SCIENCE

Petitioner argued that he was denied his federal due process right to a fair trial under the Fifth and

Fourteenth Amendments where scientifically unsound luminol testing was used to make the unreliable and heavily prejudicial claim that the blood of the victim was found in his condominium unit. The lack of confirmatory testing and the misstatement of the power of another testing method (leucocrystalviolet) led the prosecution to serve up highly prejudicial conclusions to the jury, conclusions which were in fact baseless.

Again, this is a fact based issue and Petitioner has indicated above that the critical "blood" evidence was exaggerated impermissibly, and that the record fully supports this claim. The magistrate judge, in his R & R, adopted by the district court, urged that "[t]he prosecutor simply argued that the positive luminol test results could have been blood" and "the prosecutor never argued that the luminol testing conclusively established the presence of blood." Though some brief witness examination in this case suggested the presumptive nature of this testing, the import of these brief references were buried under an avalanche of prosecutorial claims, like those outlined above, that the luminol testing showed clearly "that blood was there" and "that Mr. Holtzer took Kaylee Bruce's blood with him to his condominium." Petitioner will rely on the record as to these points as fully detailed in his previously filed brief in support of the petition. A certificate of appealability should have been granted by the Sixth Circuit on this point.

ISSUE IV – INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL

Petitioner urges that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution when direct appeal counsel failed to raise the issues outlined above, which must be seen as significant, obvious, and outcome determinative. The federal district court's opinion and order did not speak to this issue, while the magistrate judge simply concluded, based on his review of Issues I-III, that failure to raise these issues did not constitute ineffective assistance of direct appeal counsel due to their lack of merit, a conclusion echoed by the Sixth Circuit. Petitioner, as outlined above, urges that this is a point debatable among reasonable jurists on this record and urges that this Court grant his petition for writ of certiorari and send this matter back to the Sixth Circuit with direction to grant a certificate of appealability on this issue as well. The issues discussed above would have resulted in a different outcome on direct appeal had they been raised.

CONCLUSION

THEREFORE, Petitioner Kevin Holtzer respectfully requests that this Court grant this petition for a writ of certiorari and remand this matter to the United States Court of Appeals for the Sixth Circuit for full review of his issues.

Respectfully submitted,

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Dated: December 17, 2009

No. 09-1411

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN C. HOLTZER, Petitioner-Appellant, v. BARRY DAVIS, Warden, Respondent-Appellee.	)	ORDER (Filed Oct. 7, 2009)

Kevin C. Holtzer, a Michigan prisoner proceeding through counsel, applies for a certificate of appealability (COA), pursuant to Fed. R. App. P. 22(b), in order to appeal a district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus.

Following a jury trial in 1999, Holtzer was convicted of first-degree felony murder and sentenced to a mandatory term of life in prison without the possibility of parole. The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court denied leave to appeal. Holtzer thereafter filed a motion for relief from judgment, which the trial court denied under Mich. Ct. R. 6.508(D)(3). Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal based on failing to meet the burden of entitlement under Mich. Ct. R. 6.508(D).

In 2008, Holtzer filed a § 2254 petition, raising five grounds for relief: (1) ineffective assistance of

trial counsel; (2) prosecutorial misconduct; (3) violation of his due process rights by the admission of unsound luminol testing evidence; (4) ineffective assistance of appellate counsel; and (5) the application of 28 U.S.C. § 2254(d)(1) because it is unconstitutional.

The magistrate judge issued a report and recommendation (R & R) to deny the petition with prejudice, finding that Holtzer procedurally defaulted his claims and that his ineffective assistance of appellate counsel claim failed to suffice as cause to excuse the default. And in light of finding that Holtzer procedurally defaulted grounds one through four, the magistrate judge reasoned that Holtzer's fifth ground for relief was irrelevant to his analysis. Following objections, the district court issued an order approving and adopting the R & R, dismissing the petition, and denying a COA. Holtzer now seeks a COA from this court, arguing that ineffective assistance of appellate counsel provided cause for his procedural default and that prejudice was shown by an examination of the merits of each issue.

A prisoner seeking to appeal the denial of his § 2254 petition must first obtain a COA by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(A) and (c)(2). To satisfy this standard when, as here, relief has been denied on a procedural ground, the petitioner must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Holtzer has not met this standard.

"Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or that failing to review the claim would result in a fundamental miscarriage of justice." *Williams v. Anderson*, 460 F.3d 789, 805-06 (6th Cir. 2006) (internal citations omitted). Since both cause and prejudice must be shown to excuse a procedural default, the failure to establish cause eliminates the need to consider prejudice. *Murray v. Carrier*, 477 U.S. 478, 494-95 (1986).

To establish cause, the petitioner must present a substantial reason to excuse the default. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006) (quoting *Murray*, 477 U.S. at 488). The district court's findings of fact in this regard are subject to a clearly erroneous standard of review. Fed. R. Civ. P. 52(a); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994).

Holtzer argues that appellate counsel's ineffective assistance, i.e., failing to raise grounds one through three on direct appeal, should suffice as cause to excuse his procedural default. This court has held that, in the procedural default context, ineffective

assistance of counsel may constitute cause for failing to properly present a claim before a state court. *Williams*, 460 F.3d at 800 (internal citation omitted). Holtzer presented his ineffective-assistance-of-appellate-counsel claim as an independent claim in his motion for relief from judgment, which was his first opportunity to raise the claim. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000).

"A defendant is entitled to the effective assistance of counsel in his first appeal of right," which is judged under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Mapes v. Tate*, 388 F.3d 187, 191 (6th Cir. 2004) (internal citations omitted). "In order to establish a Sixth Amendment violation, it must be shown both that counsel's representation fell below an objective standard of reasonableness, and that his deficiencies prejudiced the defendant." *Id.* at 194 (citing *Strickland*, 466 U.S. at 687-88). The performance and prejudice components of the *Strickland* test are considered mixed questions of law and fact, and are thus subject to de novo review. *Strickland*, 466 U.S. at 698; *Mapes*, 388 F.3d at 190.

The scrutiny of counsel's performance is highly deferential and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Mapes*, 388 F.3d at 191. "Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue

would have changed the result of the appeal." *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008) (quoting *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004)), *petition for cert. filed*, No. 08-10636 (May 26, 2009). "If there is a reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, we can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel." *Id.* (quoting *McFarland*, 356 F.3d at 700).

For the reasons set forth by the magistrate judge and district court, jurists of reason would not debate the district court's finding that appellate counsel rendered effective assistance. Because Holtzer has failed to show a reasonable probability that inclusion of the three grounds for relief on direct appeal would have changed the result of the appeal, his ineffective-assistance-of-appellate-counsel claim fails to suffice as cause to excuse his procedural default.

Accordingly, Holtzer's COA application is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KEVIN CARTER HOLTZER,

Petitioner,

v.

BARRY DAVIS,

Respondent. /

Case No. 2:06-cv-169

HON.
R. ALLAN EDGAR

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action. The Report and Recommendation was duly served on the parties, and the Court has received objections from Petitioner. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Petitioner objects to "each and every point" in the Report and Recommendation. According to Petitioner, it was inappropriate for the Court to quote the Michigan Court of Appeals' factual summary because the issues presented in the petition filed in this Court are different than the issues presented on appeal to the Michigan Court of Appeals. Petitioner does not

identify any factual error made by the Michigan Court of Appeals and does not claim that the Michigan Court of Appeals' opinion was misquoted by this Court. Petitioner has not explained why the facts as presented by the Michigan Court of Appeals are not relevant to his petition or why it was error for the Magistrate Judge to rely on those facts.

The Magistrate Judge recommends that the Court find that Petitioner procedurally defaulted on the issues presented in this petition. Petitioner maintains that the last reasoned state court opinion was the trial court's decision and maintains that decision found good cause existed for not raising the issues presented. Petitioner misrepresents the trial court's decision. In fact, the trial court stated that because the issues were without merit, it would have been pointless to raise them on appeal. More importantly, the last reasoned state court decision came from the Michigan Supreme Court, which denied petitioner leave to appeal under MCR 6.508(D).

Petitioner also asserts that the Magistrate Judge erred in recommending that his ineffective assistance of counsel claims should be dismissed. According to Petitioner, it was constitutional error for defense counsel to not present contradicting expert testimony on the hair transference issue and the luminol testing. These issues were addressed effectively during cross-examination by defense counsel. The conclusion that there was no constitutional error is supported by the record.

Similarly, in addressing the prosecutorial misconduct issue regarding the luminol testing, Petitioner has consistently misrepresented the testimony and record in this case. Petitioner argues that luminol testing does not indicate the presence of blood. Petitioner cannot point to any testimony that indicates that luminol testing was conclusive for blood. Petitioner wants the court to imply that the prosecutor was making that claim. The testimony presented at trial was that luminol testing was a first line test for blood and could possibly detect the presence of blood. The point that it was not a conclusive test for blood was brought out repeatedly by both the prosecutor and defense counsel. Even petitioner has conceded in this petition that he wanted further expert testimony provided to point out that luminol testing could indicate only a possibility of blood. Such testimony would be nothing more than cumulative, as everyone was in agreement that luminol testing could not conclusively detect the presence of blood. Everyone has conceded that further testing was necessary to conclusively establish the existence of blood evidence.

Petitioner claims that given the lack of evidence against him, prosecutorial misconduct was conclusively established regarding the improper prosecutorial claim that pubic hairs came from Darlene Wilson. Petitioner also claims prosecutorial error for references made to petitioner's silence and references made because of petitioner's failure to turn himself in to police. Petitioner has not established that any of these claims rise to the level of prosecutorial

misconduct. Moreover, there existed significant evidence that pointed to petitioner's guilt.

Petitioner claims that the AEDPA is unconstitutional. Petitioner procedurally defaulted his claims. Accordingly, even if the Court concluded that the AEDPA was unconstitutional, petitioner could be afforded no relief. The petition is dismissed because the issues presented were procedurally defaulted.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #56) is approved and adopted as the opinion of the court.

Dated: 3/11/09 /s/ *R. Allan Edgar*
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KEVIN CARTER HOLTZER,

Petitioner,

v.

BARRY DAVIS,

Respondent. /

Case No. 2:06-cv-169

HON.
R. ALLAN EDGAR

REPORT AND RECOMMENDATION

(Filed Nov. 3, 2008)

Petitioner Kevin Carter Holtzer filed this petition for writ of habeas corpus challenging the validity of his state court conviction for first degree murder. Petitioner was convicted after a jury trial and on November 16, 1999, was sentenced to life imprisonment. Petitioner's appeal was denied by the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. Petitioner then presented the issues raised in this petition in a motion for relief from judgment. The motion for relief from judgment was denied by the trial court on March 22, 2005. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal because petitioner failed to demonstrate entitlement to relief under MCR 6.508(D). Respondent argues that petitioner has procedurally defaulted the issues presented in this petition.

The Michigan Court of Appeals summarized the facts:

> Defendant was convicted of brutally murdering eighteen-year-old Kaylee Bruce at the Beach Condominiums in Traverse City, where she worked as a desk clerk and defendant was a monthly rental. Her body was found by the maintenance supervisor on the morning of February 17, 1998. She had suffered nineteen lacerations that extended to the bone, multiple facial and skull fractures, severe neck injuries consistent with strangulation, severe blunt force injuries to the torso, chest, abdomen and pelvis, and extensive internal bleeding. Additionally, a metal rod had been forced into the decedent's vagina with such force that it lacerated her vagina and penetrated two inches into her pelvic bone. It was opined that it had been necessary to drive the rod with a mallet or kick it multiple times with a sturdy shoe to drive it into the bone. The decedent was still alive when this injury was inflicted. Additionally, the blood on her breasts had been smeared as if someone had stroked her breasts. Additionally, money was missing from the office where the decedent worked.
>
> There was a series of bloody footprints at the scene, all made from the same type of footwear, a pair of size 12 or 12-½ Caterpillar work boots. These boots were similar in style to a pair that defendant had recently owned; defendant's boots were not found, however, and no comparison was able to be made.

Defendant was seen wearing the boots before February 14, but wore different, new boots to work on February 17. Additionally, a tire valve core was found near the decedent's body; defendant worked at a Tire Factory store owned by his father. There was evidence that it was common for tire valve cores to become caught in the tread of Caterpillar boots worn by store employees.

Defendant moved out of the Beach Condominiums about a week after the murder and did not report to work as scheduled on February 26. He did return to work about two weeks later. However, in March 1998, defendant purchased an Amtrak ticket in Toledo under a false name, for passage to Carbondale, Indiana, with a changeover in Chicago. Defendant was taken into custody by the FBI in Chicago.

Defendant's felony-murder conviction was based upon the predicate felonies of third-degree criminal sexual conduct and second-degree criminal sexual conduct. A third theory of felony murder based upon a predicate felony of larceny was rejected by the jury.

In addition to the evidence set out above, the prosecutor introduced evidence based on mitochondrial DNA (mtDNA) from hairs found at the crime scene and in defendant's bedroom. The admissibility of this evidence forms most of defendant's arguments on appeal. At issue is mtDNA testing on three hairs. Two hairs subsequently determined to

> belong to defendant were found at the crime scene and are referred to as the "pubic hair" and the "torso hair." Additionally, a hair identified as belonging to the victim was found in defendant's bedroom and is referred to as the "bedroom hair."

Petitioner maintains that his conviction was obtained in violation of his federal rights. The respondent has filed an answer and has complied with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. The parties have briefed the issues and the matter is now ready for decision. In accordance with 28 U.S.C. § 636(b), authorizing United States Magistrate Judges to submit proposed findings of fact and recommendations for disposition of prisoner petitions, I am recommending that this petition for writ of habeas corpus be denied.

Petitioner has raised the following issues in his petition:

I. Ineffective assistance of counsel,

II. Prosecutorial misconduct,

III. A violation of due process when scientifically unsound luminol testing was introduced as evidence,

IV. Ineffective assistance of appellate counsel, and

V. The court should not apply 28 U.S.C. § 2254(d)(1), if it precludes relief, because that standard is unconstitutional.

Pursuant to the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This provision marks a "significant change" and prevents the district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonable application of, clearly established federal law. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Recently, the Supreme Court held that a decision of the state court is "contrary to" such clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court

has on a set of materially indistinguishable facts." *Id.* A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 412. Rather, the application must also be "unreasonable." *Id.* Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. *Id.* at 410 (disavowing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)). Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 409.

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. This presumption has always been accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Ago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990). Under the

AEDPA, a determination of a factual issue made by a state court is presumed to be correct. The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), *cert. denied*, 527 U.S. 1040 (1999).

When a state-law default prevents further state consideration of a federal issue, the federal courts are ordinarily precluded from considering that issue on habeas corpus review. *See Ylst v. Nunemaker*, 501 U.S. 797, 801 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982). The Sixth Circuit applies a four-part test to determine whether a claim is procedurally defaulted: (1) the court must first determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule; (2) the court must decide whether the state courts actually enforced the state procedural rule; (3) the default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim; and (4) if the foregoing are met, the petitioner must demonstrate cause for his failure to follow the rule and that he was actually prejudiced by the alleged constitutional error. *Buell v. Mitchell*, 274 F.3d 337, 348 (6th Cir. 2001) (*citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001). There may be an "exceptional case in which exorbitant application of a generally sound rule renders the state ground

inadequate to stop consideration of a federal question." *Lee v. Kemna*, 122 S.Ct. 877, 878 (2002). A petitioner may also excuse a default by making a colorable claim of innocence; that is, he has shown that any constitutional error "probably" resulted in the conviction of one who was actually innocent. *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (citing *Murray v. Carrier*, 477 U.S. 478, 495 (1986)). This exception is reserved for a very narrow class of cases, based on a claim of "new reliable evidence." *Schlup*, 513 U.S. at 315, 324.

The trial court denied petitioner's motion for relief for judgment under MCR 6.508(D)(3) and concluded that there lacked good cause and/or prejudice to overcome the failure to raise the issues in the initial appeal. More importantly, the Michigan Court of Appeals and the Michigan Supreme Court expressly stated that it denied petitioner's motion for relief for judgment and application for leave to appeal on the basis that petitioner failed to "meet the burden of establishing entitlement to relief under MCR 6.508(D)." Under MCR 6.508(D)(2) and (3), a defendant may not collaterally attack a conviction based upon claims that were decided against him in a prior appeal or that could have been raised on direct appeal. For claims that could have been raised, the defendant is entitled to relief only if he can establish "good cause" for failing to raise the grounds on appeal and "actual prejudice," as shown by a "reasonably likely chance of acquittal" or an "irregularity so offensive to the maintenance of a sound judicial process

that the conviction should not be allowed to stand." MCR 6.508(D)(3)(a)-(b). In assessing how "firmly" a state procedural rule has been established, the critical inquiry is whether, viewed from the time of the petitioner's later significant actions or inaction, the petitioner could be deemed to have been apprised of the procedural rule's existence. *Luberda v. Trippett*, 211 F.3d 1104, 1006-1007 (6th Cir. 2000). Because MCR 6.508(D) was enacted in 1989 and petitioner's conviction and appeals took place some time thereafter, MCR 6.508(D) was a "firmly established" procedural rule for purposes of petitioner's action. *See Luberda*, 211 F.3d at 1007; *Rogers v. Howes*, 144 F.3d 990, 994 (6th Cir. 1998).

As cause for his default, petitioner asserts that his appellate counsel should have raised the defaulted issues in an appeal of right. Petitioner argues that his trial counsel was ineffective for failing to hire an additional expert witness to testify about hair transfer issues and luminol testing. Petitioner has presented a report from an expert that indicates that there was nothing about the hair evidence that could show that it came from either petitioner or the victim. Petitioner's expert also explains how hair generally can be transferred from location to location without any foul play involved. Further, petitioner's expert report states that luminol testing can indicate only the possibility that blood is present and would need confirmation by some additional testing. In fact, the expert report states: "[t]o have enough blood on shoes or feet to produce a stain which soaked through a rug

or carpet, as described in the Laboratory Reports and accompanying notes seems entirely improbable." Petitioner argues that it was constitutional error not to present contrary expert testimony on the scientific analysis of the hair and blood evidence.

To prevail on an ineffective assistance of counsel claim, a convicted defendant must demonstrate (1) that counsel's errors were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688-96 (1984). Stated another way, this court is to decide whether the alleged failures of petitioner's trial counsel were such egregious errors as to constitute ineffectiveness and whether the alleged failures were materially prejudicial. The Sixth Circuit has explained:

> The question for reviewing courts is whether counsel's errors have likely undermined the reliability of, and confidence in, the result. *Lockhart v. Fretwell*, 113 S.Ct. 838, 842-43 (1993). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *Strickland*, 466 U.S. at 691, *quoted in Smith v. Jago*, 888 F.2d 399, 404-05 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990). In evaluating petitioner's claim, "a court must indulge a strong presumption

> that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (*en banc*), *cert. denied*, 113 S. Ct. 2969 (1993). Thus, the determinative issue is not whether petitioner's counsel was ineffective but whether he was so thoroughly ineffective that defeat was "snatched from the jaws of victory." *See id.*

West v. Seabold, 73 F.3d 81, 84 (6th Cir. 1996).

In the opinion of the undersigned, there was no constitutional error by deciding not to call additional experts to testify about hair transfer or luminol evidence. Testimony was brought out at trial that hundreds of hair samples were taken as evidence and most of those samples were dissimilar to either the victim's hair or petitioner's hair. Additional testimony about hair transference issues could have added little, if any, value to the defense. Similarly, even the prosecutor, when questioning witness Swander, brought out testimony that luminol evidence was not conclusive for blood and that other stains would result in a positive luminol test result. Witness Swander testified that luminol was a first test to determine the possibility of a blood stain. On cross examination, defense counsel brought out further testimony that luminol could not be denied for blood and would react to other substances. In fact, witness Swander could

not testify that the positive luminol findings were blood stains without additional testing. Further, defense counsel brought out testimony that stains taken from blinds in petitioner's rented condominium that indicated a positive luminol test did not test positive for blood upon further laboratory testing. Defense counsel further discussed these issues in his closing statement to the jury.

Petitioner argues that there were repeated instances of prosecutorial misconduct. Ultimately, the issue for the Court is whether the prosecutor's conduct denied petitioner a fundamentally fair trial. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940 (1982). *See also United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994) (adopting test for evaluation of prosecutorial misconduct on direct review); *Serra v. Michigan Department of Corrections*, 4 F.3d 1348 (6th Cir. 1993) (applying similar test to habeas action). Inappropriate remarks or conduct by a prosecutor constitute a matter of constitutional concern only when it is egregious enough to deprive the defendant of a fair trial. *See United States v. Chambers*, 944 F.2d 1253 (6th Cir.), *cert. denied*, 112 S. Ct. 1217 (1992); *United States v. Mohney*, 949 F.2d 1397, 1400 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992); *Paprocki v. Foltz*, 869 F.2d 281 (6th Cir. 1989).

Petitioner argues that the prosecutor committed misconduct by stating that blood was found in petitioner's condominium unit and that footprints were found leading to petitioner's condominium unit. Certainly, it was the prosecution theory that blood was

found in petitioner's condominium unit and that a pattern of blood was found that indicated footprints. It was the prosecution theory that the blood came from petitioner's boots which picked up the blood from the crime scene and transferred blood to the carpeting as petitioner returned to his unit after committing the crime. Defense counsel did a very good job of showing that the luminol testing could not conclusively indicate blood, but the testimony did establish that luminol could indicate the presence of blood. In fact, the prosecutor argued that blood was found in petitioner's condominium based upon luminol testing, which the prosecutor admitted was not conclusive. Defense counsel in his closing argument made similar arguments regarding the lack of conclusiveness of luminol testing for blood. Similarly, the prosecutor never stated with certainty that there existed a blood pattern of footsteps leading to petitioner's condominium unit, but simply argued the evidence supported such a conclusion.

Petitioner also argues that it was improper for the prosecutor to a make a statement that two pubic hairs found at the crime scene might have been from Darlene Wilson. Neither petitioner nor the victim were the source of those hairs. No testing was done to indicate that the hairs came from Darlene Wilson. Darlene Wilson did testify that she and petitioner were intimate when he visited her just hours before the murder was believed to take place. The prosecutor suggested that it was simply a reasonable explanation that the hairs could have come from

Darlene Wilson in his rebuttal closing argument. Petitioner also argues that the prosecutor improperly used petitioner's silence upon arrest and petitioner's failure to turn himself into police when he learned that he was wanted for murder as evidence of petitioner's guilt. The prosecutor did not commit misconduct on these issues. Contrary to petitioner's argument, the prosecutor did not improperly use petitioner's silence as evidence of guilt. The statement that petitioner "sat there quietly, didn't say anything, and basically showed no emotion," was made by a witness and was not responsive to the prosecutor's question. The prosecutor did not comment on petitioner's silence and did not commit misconduct on this issue. Further, the prosecutor's comment about petitioner's behavior was not misconduct.

Petitioner argues that testimony and evidence introduced regarding luminol testing violated his right to a fair trial by causing prejudice. Petitioner characterizes luminol testing as junk science and without evidentiary value. Certainly, the luminol testing was conducted as a first line test for blood. The testimony clearly indicated that it was only a first line test and that it was not a conclusive test for blood. The prosecutor simply argued that the positive luminol test results could have been blood. Contrary to petitioner's argument, the prosecutor never argued that the luminol testing conclusively established the presence of blood. The luminol testing was admitted for its value and that was simply as a first line test for possible blood presence. The fact that further

testing was not conducted was admitted as evidence and defense counsel addressed the luminol evidence effectively on cross examination and in his closing argument.

Under the circumstances of this case, appellate counsel's decision not to raise these issues does not establish ineffective assistance of counsel. In the opinion of the undersigned, petitioner cannot establish cause or prejudice to excuse his procedural default of these issues.

Since this recommendation is based upon petitioner's procedural default of the issues presented in this petition, petitioner's assertion that 28 U.S.C. § 2254(d)(1) is unconstitutional has no relevance to this analysis. The recommendation would be the same even if 28 U.S.C. § 2254(d)(1) never existed.

Accordingly, the undersigned concludes that petitioner's claims are without merit and therefore recommends that this Court dismiss the petition with prejudice.

In addition, if Petitioner should choose to appeal this action, I recommend that a certificate of appealability be denied as to each issue raised by the Petitioner in this application for habeas corpus relief Under 28 U.S.C. § 2253(c)(2), the court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel,* 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, the [sic]

The undersigned recommends that the court deny petitioner's application on [sic] based upon his procedural default. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The undersigned concludes that reasonable jurists could not debate that each of petitioner's claims are properly dismissed as defaulted. Petitioner has not established that his appellate counsel was ineffective for failing to bring issues of ineffective assistance of counsel, prosecutorial misconduct or improper admission of luminol evidence in the first appeal. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a

reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* The court also finds that reasonable jurists could not find it debatable that the Petitioner failed to present a valid claim of a denial of a constitutional right. Therefore, the undersigned recommends that the court deny Petitioner a certificate of appealability.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES
MAGISTRATE JUDGE

Dated: November 3, 2008

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEVIN CARTER HOLTZER,	Civil Action No. 2:06CV-169
Petitioner,	HON. R. Allan Edgar U.S. District Judge
-v-	
BARRY D. DAVIS,	Timothy P. Greeley U.S. Magistrate Judge
Respondent. /	

F. MARTIN TIEBER (P25485)
Attorney for Petitioner

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

(Filed Jun. 6, 2006)

Petitioner Kevin Carter Holtzer was charged, through a complaint and warrant authorized on March 12, 1998, with first degree murder (Mich. Comp. Laws 750.316) in the beating death of Kaylee Bruce, which occurred on February 16, 1998, at the Beach Condominiums in Traverse City, Michigan.

Petitioner Holtzer was arraigned in Grand Traverse County, Michigan, Circuit Court on April 27, 1998, and a plea of not guilty was entered.

A jury trial took place in Grand Traverse County Circuit Court (sitting in White Cloud, Newaygo County, after change of venue) before the Honorable Thomas G. Power from October 11, 1999 through October 21, 1999. Mr. Holtzer was found guilty of first degree

murder (one count supported by two theories, premeditation/deliberation and felony murder, see T 10/21/99 110-111). Petitioner Holtzer did not testify in his own behalf at trial. Judge Power sentenced Petitioner to mandatory non-parolable life in prison on November 16, 1999. The Grand Traverse County Circuit Court docket number for this case is 98-007603-FC.

Petitioner Holtzer (Prisoner No. 291530) is a citizen of the United States, is domiciled in Michigan, and is currently unconstitutionally detained and imprisoned by the Respondent, Barry D. Davis, Warden, at the Newberry Correctional Facility, Newberry, Michigan (Luce County).

Procedural History in State Court on Direct Appeal and Postconviction

Direct appeal was taken to the Michigan Court of Appeals. On February 25, 2003, that court issued a published opinion affirming Petitioner Kevin Holtzer's conviction and sentence. *People v. Holtzer*, 660 N.W.2d 405 (Mich. Ct App. 2003). (Docket No. 223984).[1] On March 15, 2003, Petitioner filed a timely application for leave to appeal in the Michigan Supreme Court. An order denying leave to appeal was issued on

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[1] On direct appeal to the Michigan Court of Appeals Petitioner Holtzer raised four issues relating to mitochondrial DNA evidence admitted against him at trial, and a fifth issue complaining of a denial of his right to a speedy trial.

September 25, 2003. *People v. Holtzer,* 669 N.W.2d 816 (Mich. 2003) (Docket No. 123477).[2]

Petitioner filed a motion for relief from judgment (Mich. Ct. Rule 6.500 et seq.) in the trial court on December 3, 2004. The trial court Decision and Order denying the motion for relief from judgment was issued March 22, 2005 (attached to Brief in Support as Appendix A). Petitioner Holtzer filed a timely application for leave in the Michigan Court of Appeals, which was denied by that court. *People v. Holtzer,* Docket No. 261940 (Mich. Ct. App. October 14, 2005). (Attached to Brief in Support as Appendix B).

Petitioner next, on December 5, 2005, filed a timely Application for Leave to Appeal in the Michigan Supreme Court. The issues currently before this Court were raised in the leave application filed in the Michigan Supreme Court. On May 30, 2006, that court denied leave to appeal. *People v. Holtzer,* N.W.2d (Mich. 2006) (Docket No. 130003). (Attached to Brief in Support as Appendix B).

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[2] Petitioner Holtzer did not raise the speedy trial issue in the Michigan Supreme Court. Direct review ended 90 days after denial of leave, on December 24, 2003, when the period within which Mr. Holtzer could have petitioned for a writ of certiorari to the United States Supreme Court expired. See *Clay v. United States,* 537 U.S. 522 (2003); *Bronaugh v. Ohio,* 235 F.3d 280, 283 (6th Cir. 2000); *Abela v. Martin,* 348 F.3d 164 (6th Cir. 2003); *Wyche v. United States,* 317 F. Supp 2d 1 (D. D.C. 2004).

This Petition is Timely

As noted above, footnote 2, direct review ended on December 24, 2003. At that point Petitioner Holtzer's petition in this Court was due December 24, 2004. On December 3, 2004, Petitioner filed a state postconviction motion under Mich. Ct. Rule 6.500. This filing tolled the habeas clock with 21 days remaining. Petitioner timely proceeded through the state appellate courts after his postconviction motion was denied in the trial court. This process culminated in the denial of leave by the Michigan Supreme Court on May 30, 2006 (See order, attached to Brief in Support of this Petition as Appendix B). Thus Petitioner's habeas petition was due in this Court 21 days after May 20, 2006, or on June 20, 2006. This petition is being filed on June 5, 2006.

Counsel Representing Petitioner at Various Stages

At trial Petitioner was represented by Larry C. Willey (P28870) and Raymond E. Beckering III (P45800). On direct appeal in the Michigan Court of Appeals and the Michigan Supreme Court, Petitioner was represented by Michael C. Moran (P 17950). On state postconviction and in the current habeas proceedings in this Court, Petitioner was and is represented by F. Martin Tieber (P25485).

Issues Raised on State Direct Appeal and in State Postconviction

As previously noted, on direct appeal to the Michigan Court of Appeals Mr. Holtzer raised four issues relating to mitochondrial DNA evidence admitted against him at trial, and a fifth issue complaining of a denial of his right to a speedy trial. The speedy trial issue was raised in the Michigan Court of Appeals but not in the Michigan Supreme Court. **None of these direct appeal issues are being raised on habeas before this Court.**

Petitioner raised the following four issues in state postconviction:

I. **APPELLANT HOLTZER WAS DENIED HIS STATE AND FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL (US CONST, AM V; CONST 1963, ART I, § 17) WHERE SCIENTIFICALLY UNSOUND LUMINOL TESTING WAS IMPROPERLY USED TO MAKE THE UNRELIABLE AND HEAVILY PREJUDICIAL CLAIM THAT THE BLOOD OF THE VICTIM WAS FOUND IN HIS CONDOMINIUM UNIT.**

II. **APPELLANT HOLTZER WAS DENIED HIS RIGHT TO A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS (US CONST, AMS V, XIV; CONST 1963, ART 1, § 20) WHEN THE PROSECUTOR ENGAGED IN SEVERE AND REPEATED OUTCOME-DETERMINATIVE MISCONDUCT.**

III. APPELLANT HOLTZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART 1, § 20) WHERE HIS TRIAL ATTORNEY, WITH NO STRATEGIC PURPOSE, MADE SEVERAL OUTCOME-DETERMINATIVE ERRORS.

IV. APPELLANT HOLTZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART I, § 20) WHERE HIS APPELLATE COUNSEL NEGLECTED STRONG, CRITICAL ISSUES WHICH MUST BE SEEN AS SIGNIFICANT AND OBVIOUS.

Though requested, no hearing was granted by the trial court, the Michigan Court of Appeals, or the Michigan Supreme Court on postconviction. As described above, denials were issued by the state trial court, the Michigan Court of Appeals, and the Michigan Supreme Court as to these issues.

This Petitioner has exhausted the issues raised herein.

Petitioner Kevin Holtzer did not file a petition for certiorari.

Other than the appeals to the Michigan Court of Appeals and Michigan Supreme Court and the state postconviction action under Mich. Ct. Rule 6.500

et seq. just described and the present Petition for Writ of Habeas Corpus, no other petitions, applications or motions have been filed with respect to this judgment in any state or federal court.

Federal Constitutional Issues before this Court

Again, the four issues run in state postconviction are now presented to this Court. None of these issues were run on state direct review. These issues are not, however, procedurally defaulted, either because the state trial court, in the last reasoned state court opinion, decided the issues on the merits, or because any default was excused through the ineffective assistance of state trial counsel and state direct appeal counsel, issues which have themselves now been thoroughly exhausted.

In this case Petitioner Holtzer argues that he was denied the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution and his due process right to a fair trial under the Fifth and Fourteenth Amendments, where trial counsel was not prepared for trial, and made several, outcome-determinative preparatory errors. Trial counsel failed to adequately prepare and put forward a substantial defense by not dealing with hair transference issues and by not properly assessing the "blood" evidence purporting to link Petitioner to the assault. The failure to bring in a qualified criminalist for the defense to counter the presence of three hairs (two claimed to belong to

Petitioner Holtzer allegedly found in the room where Kaylee Bruce's body was found and one claimed to belong to Bruce allegedly found in Holtzer's condominium unit) was critical. These preparatory and investigatory failures led to a failure to put forward a critical defense expert and an inability to appropriately challenge the prosecution's proofs. Petitioner also claims that trial defense counsel was constitutionally ineffective due to additional trial errors laid out in detail in the Brief in Support of this Petition.

As a second ground for relief Petitioner argues that her due process right to a fair trial under the Fifth and Fourteenth Amendments was denied when the prosecutor committed egregious misconduct by improperly claiming, with no basis in the evidence, that luminol testing revealed the victim's blood throughout the Petitioner's condominium unit and that Petitioner tracked the victim's blood back to his unit from the crime scene. Other clear prosecutorial misconduct occurred when the prosecutor testified to critical facts not in evidence and elicited the fact that Petitioner Holtzer was silent at arrest. Fact misstatements in relation to this issue by the state trial court constitute an independent ground for grant of the writ under 28 U.S.C. § 2254(d)(2).

Third, Petitioner was denied his federal due process right to a fair trial under the Fifth and Fourteenth Amendments where scientifically unsound luminol testing was used to make the unreliable and heavily prejudicial claim that the blood of the victim was found in his condominium unit. The lack of

confirmatory testing and the misstatement of the power of another testing method (leucocrystalviolet) led the prosecution to serve up highly prejudicial conclusions to the jury, conclusions which were in fact baseless.

Fourth, Petitioner urges that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States which must be seen as significant and obvious. These issues are 1-3, described above.

Issue V claims that the 28 U.S.C. § 2254(d)(1) standard of review requirement is unconstitutional for several reasons.

As noted above, Petitioner Holtzer's continued confinement is unconstitutional in several respects. As described in detail in the Brief in Support, as to each of the asserted legal grounds for relief, Petitioner Holtzer satisfies the standard of review set forth in 28 U.S.C. § 2254(d)(1). Several unreasonable determinations of fact by the state trial court provide an additional ground to grant the writ under 28 U.S.C. § 2254(d)(2). In addition, as to each and every asserted ground for relief, the identified error was not harmless under the governing legal standard.

Petitioner Holtzer has not filed any previous Petition for Writ of Habeas Corpus in this or any other federal district court. Petitioner has no future sentence to serve after completion of the sentence imposed by the judgment under attack.

WHEREFORE, Petitioner Kevin Holtzer requests that Respondent be required to appear and answer the allegations of this Petition, that after full consideration, this Court relieve Petitioner Holtzer of the unconstitutional restraint on his liberty, and that this Court grant such other, further and different relief as the Court may deem just and proper under the circumstances, as well as grant oral argument and an evidentiary hearing in this matter.

Respectfully Submitted,

BY: /s/ F. Martin Tieber

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Dated: June 5, 2006

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEVIN CARTER HOLTZER, Civil Action No.

Petitioner,

HON. R. ALLAN EDGAR
U.S. District Judge

-v-

BARRY D. DAVIS,

Timothy P. Greeley
U.S. Magistrate Judge

Respondent.

_____/

F. MARTIN TIEBER (P25485)
Attorney for Petitioner

_____/

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

(Filed Jun. 6, 2006)

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STATEMENT OF QUESTIONS PRESENTED

1. WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL (US CONST. AMENDS. VI, XIV), AND A FAIR TRIAL, WHERE HIS TRIAL ATTORNEY, WITH NO STRATEGIC PURPOSE, MADE SEVERAL OUTCOME-DETERMINATIVE ERRORS.

2. WHETHER PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL (U.S. CONST. AMENDS. V, XIV) WAS VIOLATED WHEN THE PROSECUTOR ENGAGED IN SEVERE AND REPEATED OUTCOME-DETERMINATIVE MISCONDUCT

3. WHETHER PETITIONER HOLTZER WAS DENIED HIS FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL (U.S. CONST., AMS. V, XIV) WHERE SCIENTIFICALLY UNSOUND LUMINOL TESTING WAS IMPROPERLY USED TO MAKE THE UNRELIABLE AND HEAVILY PREJUDICIAL CLAIM THAT THE BLOOD OF THE VICTIM WAS FOUND IN HIS CONDOMINIUM UNIT.

4. WHETHER PETITIONER HOLTZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AM. VI) WHERE HIS APPELLATE COUNSEL NEGLECTED STRONG, CRITICAL ISSUES WHICH MUST BE SEEN AS SIGNIFICANT AND OBVIOUS.

5. WHETHER, ASSUMING ARGUENDO THAT THE STANDARD OF REVIEW SET FORTH IN 28 U.S.C. §2254(D)(1) PRECLUDES RELIEF IN THIS ACTION, THE COURT SHOULD NOT APPLY THAT STANDARD BECAUSE IT IS UNCONSTITUTIONAL, AND THE COURT SHOULD GRANT THE WRIT UNDER A DE NOVO STANDARD OF REVIEW.

STATEMENT OF THE CASE

Petitioner Kevin Carter Holtzer was charged with first degree murder (Mich. Comp. Laws 750.316) in the beating death of Kaylee Bruce, which occurred on February 16, 1998, at the Beach Condominiums in Traverse City, Michigan.

A jury trial took place in Grand Traverse County Circuit Court (sitting in White Cloud, Newaygo County, after change of venue) before the Honorable Thomas G. Power from October 11, 1999 through October 21, 1999. Mr. Holtzer was found guilty of first degree murder (one count supported by two theories, premeditation/deliberation and felony murder, see T 10/21/99 110-111) and sentenced to mandatory non-parolable life in prison by Judge Power on November 16, 1999.

Direct appeal was taken to the Michigan Court of Appeals. On February 25, 2003, that court issued a published opinion affirming Petitioner Kevin Holtzer's conviction and sentence. *People* v. *Holtzer,*

660 N.W.2d 405 (Mich. Ct. App. 2003).[1] On March 15, 2003, Petitioner filed a timely application for leave to appeal in the Michigan Supreme Court. An order denying leave to appeal was issued on September 25, 2003. *People* v. *Holtzer,* 669 N.W.2d 816 (Mich. 2003) (Docket No. 123477).[2]

Petitioner filed a motion for relief from judgment (Mich. Ct. Rule 6.500 et seq.) in the trial court on December 3, 2004. The trial court Decision and Order denying the motion for relief from judgment was issued March 22, 2005 (attached as Appendix A). Petitioner Holtzer filed a timely application for leave in the Michigan Court of Appeals, which was denied by that court. *People* v. *Holtzer,* No. 261940 (Mich. Ct. App. October 14, 2005). (Attached as Appendix B).

Petitioner next, on December 5, 2005, filed a timely Application for Leave to Appeal in the Michigan Supreme Court. The issues currently before this Court were raised in the leave application filed in

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[1] On direct appeal to the Michigan Court of Appeals Mr. Holtzer raised four issues relating to mitochondrial DNA evidence admitted against him at trial, and a fifth issue complaining of a denial of his right to a speedy trial.

[2] Mr. Holtzer did not raise the speedy trial issue in the Michigan Supreme Court. Direct review ended 90 days after denial of leave, on December 24, 2003, when the period within which Mr. Holtzer could have petitioned for a writ of certiorari to the United States Supreme Court expired. See *Clay* v. *United States,* 537 U.S. 522 (2003); *Bronaugh* v. *Ohio,* 235 F.3d 280, 283 (6th Cir. 2000); *Abela* v. *Martin,* 348 F.3d 164 (6th Cir. 2003); *Wyche* v. *United States,* 317 F. Supp 2d 1 (D. D.C. 2004).

the Michigan Supreme Court. On May 30, 2006, that court denied leave to appeal. *People* v. *Holtzer*, ___ N.W.2d ___ (Mich. 2006) (Docket No. 130003).

STATEMENT OF FACTS

A. Introduction

Kevin Holtzer was charged with first degree murder in the February 16, 1998 killing of Kaylee Bruce at the Beach Condominiums in Traverse City. Petitioner Holtzer was a monthly renter and Ms. Bruce was a desk clerk at the condominium units when the killing occurred. The defense did not contest the fact that the killing was extremely brutal (T 10/11/99 226-238).

Petitioner Holtzer was connected to the crime through scant circumstantial evidence. Robbery was the apparent motive as money was missing from the cash box at the Beach Condominiums (T 10/11/99 288-289). However, Petitioner was working at one of his father's many Tire Factory stores and has been represented by retained counsel throughout the lengthy trial, appellate and postconviction proceedings in this case. Multiple searches and seizures were conducted of Petitioner's condo unit, his car, the condo office where the killing occurred and Petitioner's girlfriend's residence in an attempt to connect Petitioner to the crime (T 10/12/99 85-139). These efforts were largely fruitless. Two sets of keys found near Bruce's body were not connected to Petitioner (T 10/12/99 37).

The prosecutor focused on "boot" testimony, claiming that Petitioner had a pair of boots "very similar" to those that left prints at the scene, boots which Petitioner discarded near the time of Bruce's killing. However, investigators could not rule out other boots as having left these prints (T 10/12/99 141-142). Moreover, several witnesses testified that Petitioner's boots were defective as they had been covered with white paint during remodeling of the Tire Factory store (T 10/12/99 164-175, 201-203, 210-213, 223-227, 238-239, 245-246).

The prosecutor also seized on the fact that Petitioner left the Traverse City area, ending up in Chicago where he was arrested on March 1, 1998, after learning that he was wanted for murder (T 10/13/99 116-126, 153-157). The key convicting evidence was the hair and blood evidence, discussed below. Petitioner Kevin Holtzer denied involvement in Bruce's murder (T 10/13/99 175).

B. Hair Evidence and Transference Issues

Three pieces of hair were the subject of extensive hearings on the propriety of mitochondrial DNA analysis by two labs (LabCorp and Mitotyping), at least one of which was running validation studies at the time the hairs in question were being analyzed. Over defense objection the hairs were admitted against Kevin Holtzer at trial and became the primary convicting evidence against him.

The three hairs consisted of two pubic hairs found in the office area of the Beach Condominiums, where Bruce's body was found, which were claimed to contain DNA consistent with that of Petitioner Holtzer, and one head hair found in Petitioner Holtzer's condominium unit said to contain DNA consistent with that of the victim, Bruce. One of the pubic hairs claimed to be consistent with Holtzer was said to have been found attached to a spent tire valve core. Mr. Holtzer worked at a tire store.

In opening argument, the prosecutor focused on these three hairs (which were referred to as the torso hair, the pubic hair and the bedroom hair) as the key evidence linking Mr. Holtzer to the murder of Kaylee Bruce (T 10/11/99 190-192, 194-197).

A number of hairs were found on Holtzer's clothing, including two pubic hairs. Most of these hairs were found to be dissimilar to Holtzer and Bruce (T 10/14/99 67-69). One of two pubic hairs found could have belonged to Holtzer but neither matched Bruce (T 10/14/99 69). Other hairs, head and pubic, found in Holtzer's condo unit, in the drain and on the floor mat, did not match Bruce (T 10/14/99 69-73). A large number of hairs from Holtzer's vehicle were examined and none of them were similar to Bruce (T 10/14/99 74). Fifty to seventy-five hairs were collected from Holtzer's bathtub drains and none were found to be similar to Bruce (T 10/14/99 74-75). Fifty to sixty hairs were collected from Holtzer's sink drain and none were found to be similar to Bruce (T 10/14/99 75). Fifty to sixty hairs from Holtzer's dryer

and twenty-five to thirty from his washer agitator were examined and none were found to be similar to Bruce (T 10/14/99 76).

After the murder, a "whole bunch of hairs" were collected from "body wraps,"[3] including two pubic hairs which could not be matched to either Holtzer or Bruce and at least one other hair that did not match either Holtzer or Bruce (T 10/14/99 77-79). None of these hairs were matched to Holtzer.

Of the two pubic hairs claimed to match Holtzer and said to be found in the room where the body was found (one was allegedly found on Bruce's torso), only one was sent on to a second lab (Mitotyping) for confirmation of mtDNA results after extensive hearings revealed severe problems with the testing at the first lab (LabCorp) (T 10/15/99 129).

Mr. Holtzer had been living in a monthly rental unit at the Beach Condominiums for nearly three months at the time of Bruce's death, having moved in on November 20, 1997 (T 10/11/99 303). His unit (106) was entered on a daily basis by housekeeping personnel at the Beach Condominiums in order to exchange towels and to remove the garbage. Once a

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[3] The body wraps were clean sheets that were used to wrap the body of the deceased (T 10/12/99 98). While the source of these sheets is not clear it is likely that sheets borrowed from the Beach Condominiums were utilized as detectives described borrowing and using sheets from the Condominiums to perform other crime scene functions at and around the location where the body was discovered (T 10/12/99 23-24).

week the unit was thoroughly cleaned (including vacuuming and mopping of the floors) (T 10/13/99 43).

The pubic hair that was attached to a tire valve core[4] was found in an area of the utility room (behind the front desk) of the Beach Condominiums separate from the body of Bruce. It was found to the left of the doorway while Bruce's body was "around on the opposite side of the door" (T 10/12/99 38-39). The hair was separated from the valve core at the lab and the technician who did the separation could not say "whether it was pinched in there, or stuck by blood, but it was attached to it."[5]

The office area and utility room where Kaylee Bruce worked and where her body was found was regularly utilized by employees, including housekeeping staff, as the time clock was in this area and employees would punch in and punch out (T 10/11/99 281). The utility room contained a small "freezer" unit and coffee supplies and would presumably be

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[4] A detective testified that the valve core at issue was a common item readily available from a variety of retail outlets: "they all basically look alike" (T 10/12/99 115-116).

[5] It seems apparent from this account that the evidence technician who found the pubic hair attached to the tire valve core could not determine whether there was any agent at all causing the two items to be attached, as the hair could have been "pinched" into the core. The mention of blood, in the absence of any serological analysis, or even any analysis to determine if **any** agent caused the hair to be stuck to the valve core, was highly prejudicial and apparently without basis in fact.

regularly visited by employees who wished to obtain access to these items (T 10/12/99 12). The time clock utilized by employees was located in the same room (utility room with water heater) where Bruce's body was found (T 10/11/99 285; 298; 10/12/99 29). Five to seven different employees handled cleaning chores at the Beach Condominiums and the employee assigned to handle cleaning chores in Mr. Holtzer's unit would change from day to day (T 10/13/99 48).

Kaylee Bruce had repeated personal contact with Mr. Holtzer (T 10/11/99 295-297). Holtzer would often lock himself out of his room and at times "someone would walk him down with the master key" to let him in. It was likely that Kaylee Bruce had to perform this service for Holtzer in the course of her employment at the Beach Condominiums (T 10/11/99 304-306).

During pretrial hearings in this case the trial court stated:

> "[O]ne would not expect the victim's hair to be in the Defendant's condominium, so that had some probative value . . . and the pubic hair at the scene of the crime was said to have a sequence the same as the Defendant's, and, obviously, one would not expect to have his DNA at the scene of the crime, that would have probative value . . . " (MT 6/10/99 36).

C. "Blood" and Luminol Testing

In opening argument, the prosecutor told the jury:

> "At Mr. Holtzer's condominium unit, however, the police, with the assistance of the state police crime laboratory personnel, in particular, Connie Swander, who does serology work and other trace evidence work for the Michigan State Police, went inside Mr. Holtzer's condominium, and with a substance, she'll explain to you, it's called Luminol, it's something that reacts with blood, reacts with other materials, but it does show a reaction to blood, it actually luminesces, it lights up, it glows when it's contacted with blood, blood that you can't see with the naked eye, blood that's been cleaned up, you use Luminol and get a reaction, and see if there's blood present.
>
> So they went inside Mr. Holtzer's condominium Unit 106. Inside is a brown throw type rug, like a mat that you would have inside your door. On that brown rug Connie Swander obtained a glow from the Luminol, indicating that blood was there, couldn't see it, but the Luminol glowed." (T 10/11/99 189-190).

The prosecutor continued along these lines, telling the jury that the luminol glow (and therefore blood) continued throughout Mr. Holtzer's unit and even outside onto his deck (T 10/11/99 190).

The prosecutor claimed in opening statement that there was blood on the rug in Mr. Holtzer's condominium unit because of the luminol reaction and because DNA was extracted from the stain sample on the rug (T 10/11/99 192-193).[6] The prosecutor finished his opening statement with a claim that Mr. Holtzer "took Kaylee Bruce's blood with him to his condominium" (T 10/11/99 197).

Michigan State Police forensic scientist Connie Swander testified that luminol would react to substances other than blood, but differently (T 10/14/99 20-21). Swander testified to luminol reactions throughout Petitioner Holtzer's unit and out onto the deck and responded affirmatively to the prosecutor's question as to whether "luminol is used to detect blood that has been cleaned up" (T 10/14/99 22-27). Possibly speaking hypothetically, Swander stated that "there actually is some real dilute blood still down in the carpet" (T 10/14/99 28).

Swander noted the need to take samples back to the lab for additional testing to determine if indeed they contained blood after a positive luminol reaction (T 10/14/99 57), but then noted that she did not take any of the material from inside or outside Petitioner Holtzer's unit back to the lab for further analysis (T 10/14/99 59-62). She claimed she got reactions to a leucocrystalviolet test (which she claimed was in fact

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[6] It appears that no serology testing was done on this material (T 10/14/99 59-62, 124-128).

specific for blood)[7] on two "very small" stains on Petitioner's deck, stains which were "actually worked into the wood" (T 10/14/99 61).

Swander stated that even though she got a reaction to certain evidence from both luminol and "TMB" at the scene, she was able to rule out the presence of blood on this evidence during further testing at her lab (T 10/14/99 63-64).

Marcia Eisenburg, vice president and senior director at LabCorp, later testified that Kaylee Bruce was excluded as a contributor to a stain on the carpet (pink carpet identified as Exhibit 47) (T 10/14/99 116-117). With respect to a stain from Mr. Holtzer's brown rug or mat, Eisenburg could not indicate what type of human body fluid caused it (T 10/14/99 124-128).

In closing argument the prosecutor stated:

> Now, there is also something that he couldn't get rid of, not then, and not in this trial, the

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[7] It seems Swander's claims in this respect were not accurate. According to the *Sourcebook in Forensic Serology, Immunology, and Biochemistry*, by R.E. Gaensslen, Ph.D., August, 1983, distributed by the U.S. Department of Justice, National Institute of Justice, Leucocrystal Violet reacts with "many chemical oxidants" and thus is "not more specific for blood than most of the other catalytic tests." See pertinent sections of the *Sourcebook*, attached as Appendix F. This critical misstatement by Swander, which suggested to the jury that there could have been nothing other than bloodstains on Petitioner Holtzer's deck, was sufficient in and of itself to require the grant of a new trial.

blood in his condo, human blood in his condominium. The blood on the brown rug, just the brown rug, that's the first thing inside his condominium, three different places where Luminol glowed when tested by Connie Swander. And I'm going to get to Luminol, and whether that's blood in a minute. **But what we had on that rug, and how you can leave blood stains on a rug, are by stepping on the rug.**

. . . [A]nd the Luminol glows only where there's blood, or some element that it reacts with, but that's what she saw.

Now, following that, inside of the condominium we had more Luminol reactions. And these again could not be developed to show footprints, but there was a pattern, full dimensional patterns, not drops, not splatters, not like something spilled, and they were in an order which suggested a stride. . . .

Well, you know, the first question you ask is, what's blood doing there?

And it's blood on the brown rug, because it was capable of giving a DNA extraction. Now, someone might want to argue it's saliva, or some other fluid, but this is where you have to start employing your own common sense. There's DNA in that stain that it reacted to Luminol. Luminol glows when it contacts blood. The stain that glowed showed DNA. Doesn't that equal a

blood stain, just by use of your common sense?

Now, the question is, whose blood is it? . . . Three alleles means there's more than one person's blood there, more than one person's DNA." (T 10/21/99 26-28).

D. Additional Facts Pertinent to Current Issues Raised on Federal Habeas

On direct examination of the officer in charge of the case, the prosecutor elicited the fact that, after arrest, Mr. Holtzer "sat there quietly, didn't say anything, and basically showed no emotion" (T 10/13/99 75). In closing argument the prosecutor emphasized Petitioner Holtzer's claimed failure to question the police on the morning that Bruce's body was found (T 10/21/99 14). The prosecutor later told the jury that Mr. Holtzer's failure to go to the police and question them when he found out that he was wanted for murder showed his guilt (T 10/21/99 20). Finally, the prosecutor, near the end of his rebuttal closing argument, told the jury that the "mysterious pubic hairs in the body covers" came from Darlene Wilson, asserting that "there wasn't that much time between this killing and the time that Kevin Holtzer had his conjugal visit with Darlene Wilson" (T 10/21/99 67).

STANDARD OF REVIEW

The standard of review for a habeas petition is set forth in 28 U.S.C. § 2254(d). That section provides that the writ may be granted if the state appeal:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This habeas petition is predicated upon these standards.

28 U.S.C. § 2254(d)(2) presents an independent ground permitting the grant of the writ if the state court decision was based on an unreasonable determination of the facts. See *Williams v. Taylor*, 529 U.S. 362, 386 (2000). See also, *Green v. White*, 232 F.3d 671, 672 (9th Cir. 2000). 28 U.S.C. § 2254(d)(2) should be read in conjunction with 28 U.S.C. § 2254(e)(1) which allows the presumption of correctness as to state court factual determinations to be dislodged by clear and convincing evidence.

As used in the federal habeas statute, the phrase "clearly established federal law" refers to the holdings of the United States Supreme Court. *See Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir. 2002). However, "clearly established law under the Act encompasses

more than just bright-line rules laid down by the [Supreme] Court." *Id.* It also includes "the legal principles and standards flowing from those rules." *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir. 2005). Accordingly, "the lack of an explicit statement of a particular rule by the Supreme Court is not determinative." *Id.*

Habeas relief is warranted where a state court decision is either "contrary to" or "an unreasonable application of" clearly established federal law. A decision is "contrary to" federal law in two situations: where the state court "applies a rule that contradicts the governing law set forth in" Supreme Court decisions, *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), or where the state court "decided a case differently than the Supreme Court has decided on a set of materially indistinguishable facts." *Dorchy v. Jones*, 398 F.3d 783, 787 (6th Cir. 2005).

The habeas statute also grants relief where the state court decision is an "unreasonable application of" federal law. A state court unreasonably applies federal law where it "correctly identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Ruimveld*, 404 F.3d at 1010. This provision does not require that the Supreme Court must have previously decided the very case that a lower court has before it. Rather, an unreasonable application occurs where "the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new

context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.*

Finally, where a state court does not assess the merits of a constitutional claim that was presented to it, the deference due under AEDPA "does not apply." *Maples v. Steagall*, 340 F.3d 433, 437 (6th Cir. 2003); *Wynne v. Renico*, 279 F. Supp. 2d 866, 879 (ED. Mich. 2003).

ARGUMENT

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL (US CONST. AMENDS. VI, XIV), AND A FAIR TRIAL, WHERE HIS TRIAL ATTORNEY, WITH NO STRATEGIC PURPOSE, MADE SEVERAL OUTCOME-DETERMINATIVE ERRORS.

The United States Supreme Court's standard for reviewing ineffective assistance claims is fully set forth in the companion cases of *United States v. Cronic*, 466 U.S. 648 (1984); and *Strickland v. Washington*, 446 U.S. 668 (1984). The Michigan Supreme Court adopted these standards in reviewing the similar Michigan constitutional protections. *People v. Pickens*, 521 N.W.2d 797 (Mich. 1994). See also, *McMann v. Richardson*, 397 U.S. 759, 771 n 14 (1970). Indeed, the right to the effective assistance of counsel is longstanding and of paramount importance. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

As the United States Supreme Court recognized in *Cronic*, *supra* at 653-654:

> Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.' (Citations omitted).

In the *Cronic* case the Court discussed the history of the Sixth Amendment and emphasized that the right was not to "counsel," but rather to "the assistance of counsel for the Petitioner's defense." The Court cited earlier authority to emphasize the entitlement to both "a reasonably competent attorney" and advice "within the range of competence demanded of attorneys in criminal cases." *Cronic*, 466 U.S. at 655. The Court in *Cronic*, at 654-655, reviewed part of the history of the Sixth Amendment, and emphasized that the right was to "actual 'Assistance' 'for' the accused's 'defence,'" and "to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Throughout the opinions there is an unmistakable focus upon the fairness of the trial.

The *Strickland* test.

In *Strickland*, *supra*, the United States Supreme Court definitively laid out the tests to determine whether a criminal defendant was afforded due process when he or she claims that counsel was ineffective. The Court clearly stated that these tests are to be used by state and federal courts in interpreting the federal constitutional guarantee of counsel under the Sixth Amendment.

In the *Strickland* case David Washington, after tendering a plea at the guilt phase and waiving an advisory jury at his capital sentencing hearing, was sentenced to death by a Florida judge. Washington later argued that his attorney was ineffective at the sentencing hearing. Washington asserted that his attorney should have, among other things, investigated and presented character witnesses, requested a presentence report, and asked for a continuance to obtain a psychiatric report.

The Supreme Court in *Strickland* left no doubt that the federal constitution demands effective counsel in state prosecutions:

> In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth

> Amendment, including the Counsel clause. *Id.* at 684-685.

The Court went on to hold that the right to counsel plays a "crucial role" given our adversarial system of justice – counsel's abilities (skill and knowledge) are fully required to meet the prosecution's case. *Id.* at 685. Counsel is required to ensure that the trial is fair. *Id.* at 685. For that reason, the right to counsel means, under the federal constitution, the right to **effective** counsel. *Id.* at 686. Noting the various ways in which the state can interfere, the Court emphasized that the right to counsel under the Sixth Amendment can be denied "simply" by a failure of "adequate legal assistance." *Id.* at 686, citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980).

Recognizing that little guidance had been provided to the lower courts on how to assess the adequacy of counsel's performance when a general "actual ineffectiveness" claim is brought, the Court emphasized that the key determinant is whether a fair trial was provided. The question is whether counsel's performance errors undermined the proper functioning of the adversarial system to the point where "the trial cannot be relied on as having produced a just result." *Strickland*, *supra* at 686.

To aid the inquiry, the Court in *Strickland* set out a two part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious

> that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687

The non-specific "objective standard of reasonableness" is utilized in assessing counsel's performance under this two part test. *Id.* at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

The Court, though giving a nod to the ABA Standards for Criminal Justice 4-1.1 through 4-8.6, clearly stated that no particular set of rules governed assessment of counsel's performance. A case by case analysis, highly deferential, should be employed. *Id.* at 688-689. In order to prevail a defendant must overcome a presumption that counsel's actions were the result of sound strategy. *Id.* at 689.

The *Strickland* Court outlined the duties of the deciding court:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions

> were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

The Court emphasized the importance of counsel's investigatory duties, and, though agreeing that strategic choices made "after thorough investigation of law and facts relevant to plausible options" are sacrosanct, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-691. A decision not to investigate must be "directly assessed for reasonableness." *Id.* at 691.

As to prejudice, the Court rejected a stringent standard that would require a defendant to show that his attorney's lacking performance "more likely than not" changed the verdict. Noting that effective counsel is "one of the crucial assurances that the result of the proceeding is reliable," the Court opted for the standard utilized in government non-disclosure and interference cases:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

The *Strickland* Court stressed the importance of assessing the totality of the evidence in a case in making this determination:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a perverse effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. **Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.** Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. *Id.* at 695-696, emphasis added.

The Court repeatedly stressed the importance of the "fundamental fairness" of the proceeding. Noting the deference owed in this habeas action, and that a clearly erroneous standard is generally employed in assessing federal district court findings, the *Strickland* Court stated that both the performance and prejudice aspects involve mixed questions of law and fact. Applying the review standards to Mr. Washington's case, the Court found no indication of a lack of investigation or knowledge on the part of Washington's lawyer. And, as to prejudice, the evidence that Washington claimed was neglected at his capital sentencing proceeding "would barely have altered the sentencing profile." *Id.* at 700. The Court held that Mr. Washington's lawyer was constitutionally effective.

Applying the *Strickland* tests to the asserted errors of counsel in this case requires that Mr. Holtzer's request for a writ of habeas corpus must be granted.

The only portion of a state court's decision on such claims that are entitled to deference are findings of fact. *Berryman v. Morton*, 100 F.3d 1089, 1104 (3rd Cir. 1996) (discussing Section 104(3)(d)(2) of the AEDPA). However, no deference is required if the decision "was based on an unreasonable determination of the facts in light of the evidence presented" in the state court. *Id.*

The need for a hearing

Recently, the United States Supreme Court has outlined the critical need to develop a testimonial record post-conviction on the issue of ineffective assistance of trial counsel. In *Massaro* v. *United States*, 538 U.S. 500 (2003), the Court discussed the need to show "that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial." *Id.* at 505. In other words a hearing is necessary to show that the *Strickland* standards have been met. The *Massaro* Court went on to specify why a post-conviction hearing on the point was needed:

> The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. *Id.* at 505.

Federal courts have consistently held that it is error when a state court fails to allow a defendant, who has diligently sought a hearing, the opportunity to develop a factual base for issues he is attempting to raise on appeal. *Greer* v. *Mitchell*, 264 F.3d 663 (6th Cir. 2001), *Smith* v. *Stewart*, 241 F.3d 1191 (9th Cir. 2001), *Murphy* v. *Johnson*, 205 F.3d 809 (5th Cir. 2000), *Barnes* v. *Elo*, 231 F.3d 1025 (6th Cir. 2000), *Baja* v. *Ducharme*, 187 F.3d 1075 (9th Cir. 1999). *Landrigan* v. *Schriro*, 441 F.3d 638 (9th Cir. 2006).

In this case Petitioner Holtzer has requested an evidentiary hearing on the issues raised in this

habeas petition at each stage of the state court system, from the trial court, through both of Michigan's appellate courts. The request for a hearing has been repeatedly denied. Petitioner is not at fault and this Court should grant an evidentiary hearing in this case.[8]

Failure to Present a Substantial Defense

There is no failure of advocacy more basic, or damaging, than the failure to pursue and present a substantial defense. *Washington v. Texas*, 338 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In *Taylor v. Illinois*, 484 U.S. 400, 408-409 (1988), the Court held that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive." Even the Michigan Supreme Court recognized, in *Pickens*, *supra* at 803, that "Michigan law has long required that defense counsel present a reasonable defense."

The necessity of pretrial investigation and preparation cannot be overstated, or even compensated for by skill and experience. *Strickland's* performance standard of reasonableness requires counsel to make pertinent factual and legal inquiries, and to allow adequate time for trial preparation and development of strategies and defenses. As the court put the

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[8] The Appendix material (Appendices C through E) focusing on hair transference and blood analysis matters are submitted in support of Petitioner's request for an evidentiary hearing.

matter in *United States v. Barbour*, 813 F.2d 1232, 1234 (D.C. Cir. 1987), quoting from *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984):

> Effective representation hinges on adequate investigation and pretrial preparation . . . [for] investigation may help an attorney develop or even discover a defense, locate a witness or unveil impeachment evidence. *Id.* at 583 (citing *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973))."

In *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993), the 8th Circuit found counsel ineffective for failing to investigate. The court was particularly concerned with the failure to prepare the case properly:

> [A]lthough we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory choices. *Id.* at 726.

See also *Groseclose v. Bell*, 130 F.3d 1161, 1169-70 (6th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998).

In *Bryant v. Scott*, 28 F.3d 1411, 1417-1419 (5th Cir. 1994), the court found that trial defense counsel's failure to investigate potential alibi witnesses was not a strategic choice and was "unprofessional conduct falling below the standard of a reasonably competent attorney practicing under prevailing professional norms." The court concluded that the failure to investigate failed the performance prong of the *Strickland* test. Indeed, the United States Supreme Court has recently held that the entire

strategy inquiry in relation to an assessment of an ineffective assistance of counsel claim is dependent on adequate investigatory efforts by counsel. See, *Wiggins v. Smith*, 539 U.S. 510 (2003). See also *Bigelow v. Williams*, 367 F.3d 562, 566 (6th Cir. 2004) ("the respect that attorneys' strategic decisions in a criminal trial will receive is proportionate to the extent of the investigation they in fact conducted").

Trial counsel's failure to adequately prepare and put forward a substantial defense by dealing with the hair transference issues and by properly assessing the "blood" evidence clearly amounted to a failure of constitutional magnitude. The failure to bring in a qualified criminalist for the defense to counter the presence of three hairs (two claimed to belong to Petitioner Holtzer allegedly found in the room where Kaylee Bruce's body was found and one claimed to belong to Bruce allegedly found in Holtzer's condominium unit) was critical. There can be no doubt, looking at the information provided by a nationally acclaimed expert in this area (Appendix C)[9] and

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[9] Report, Review of Crime Scene Hair and Blood Stain Evidence, December 1, 2004 by Peter D. Barnett, D-ABC, Criminalist, Forensic Science Associates. See also, CV of Peter Barnett, attached as Appendix D, and the Fact Statement on Hair Transference provided to Mr. Barnett, attached as Appendix E. Mr. Barnett's report is a preliminary report and Petitioner Holtzer urges this Court to order an evidentiary hearing in this matter so that the testimony of Mr. Barnett can be taken on the critical points noted in his report. If an evidentiary hearing is granted the defense would request that Mr. Barnett be permitted to view the scene and the physical evidence in this case prior to testifying.

considering the exceptional importance given this hair evidence by the prosecution, that it was not "safe to proceed to trial" without a defense expert to counter this evidence. See *People* v. *Tanner*, 660 N.W.2d 746 (Mich. Ct. App. 2003) *rev'd on other grounds* 671 N.W.2d 728 (Mich. 2003).[10]

Mr. Barnett's preliminary report (Appendix C) is indeed critical and notes, at p. 3, that "[t]here is nothing about any of these hairs [the pubic hair, the torso hair and the bedroom hair] to provide strong evidence that they were shed during the commission of the crime by either the perpetrator or Ms. Bruce." Barnett details the many ways these hairs could have come to be located where they were allegedly found in an innocent manner. This is absolutely vital information. If the jury had been provided with this information at trial, through an acclaimed criminalist with impeccable credentials, Mr. Holtzer would have had a reasonably likely chance of acquittal. Especially if the jury was not repeatedly told, improperly, that the victim's blood was in Mr. Holtzer's condominium (Issue III, *infra*). These matters were the heart and substance of the prosecution's case and had to have substantially impressed the jury, considering that we live in an era where CSI is on television in

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[10] Stated another way, expert assistance for the defense is required where, without it, a criminal defendant would be denied "an adequate opportunity fairly to confront the state's case and to present his defense." *Conklin v. Schofield*, 366 F.3d 1191, 1208 (11th Cir. 2004).

some form nearly every evening. The need for a credentialed defense expert to drive home the point to the jury that the hair and luminol evidence was extremely minimal on these facts was essential.

Indeed, courts across the country have noted the acceptance and importance of hair transference evidence. The cross-transference of hair evidence was crucial to the state's case against the petitioner in *Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999). The same was true in *Thomas v. State*, 374 So.2d 508, 514 (Fla. Sup. Ct. 1979). In *State v. Butler*, 24 S.W.2d 21 (Mo. Ct. App. 2000), the court discussed the defense theory of hair transference as bearing on the ultimate decision not to reverse due to faulty, unscientific hair comparison testimony. And the prosecution used a hair transference theory to explain the presence of a hair fragment of African-American origin, not belonging to the defendant, in the victim's bedroom, in *Cherry v. Moore*, 829 So.2d 873 (Fla. S. Ct. 2002). In this case it was not safe to proceed to trial without a hair transference expert, and Mr. Holtzer did not have an adequate opportunity to fairly confront the state's case and to present his defense without such an expert.

Another reason why defense counsel's failure to investigate and secure a qualified criminalist must be seen as reversible ineffective assistance of counsel involves the improper luminol and leucocrystalviolet evidence (see Issue III, *infra*). *See* Peter Bamett's detailed discussion on this point in his report, Appendix C. Not only would Barnett have been able

to debunk the prosecutor's hair evidence, he would have cast severe doubt on the prosecutor's dramatic and constant claims that Mr. Holtzer had brought Kaylee Bruce's blood back to his condominium unit. But for defense counsel's failure in this regard, Petitioner would have been able to gut the key components of the prosecutor's case against him. Failure to investigate and bring in a credentialed criminalist was outcome determinative under these facts.

In *Stouffer* v. *Reynolds*, 214 F.3d 1231, 1234 (10th Cir. 2000) the failure to obtain funds to hire a defense expert was among counsel's deficiencies resulting in reversal. See *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). See also *People* v. *Grant*, 684 N.W.2d 686 (Mich. 2004) where the Michigan Supreme Court held that the failure of defense counsel to investigate critical matters required the grant of a new trial.

In *Soffar* v. *Dretke*, 368 F.3d 441, 476 (5th Cir. 2004) the court recently determined that the failure of defense counsel to investigate and retain a ballistics expert, when that type of expert was critical to the defense, violated *Strickland*:

> The Supreme Court recently determined that "[i]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." . . . We also agree with Soffar that his defense counsel were deficient in not seeking out a ballistics

> expert when there were such readily apparent discrepancies between the ballistics evidence and the State's theory of the case. The State's theory relied heavily on ballistics evidence to show a correlation between the statement attributed to Soffar and the crime scene. Yet Soffar's defense counsel never even consulted with a ballistics expert. Defense counsel were aware of the inconsistencies between Garner's statements and Soffar's confessions regarding both the number of shots fired and the location of the victims when the shootings occurred. The defense counsel also were aware from the prosecution's file that the police recovered bullets and bullet fragments weighing less than the total weight of five bullets, which tended to corroborate Garner's account of the events. Considering this, it was objectively unreasonable for defense counsel to fail to consult with a ballistics expert to determine whether they could develop expert testimony as to physical evidence that tended to undermine the credibility and reliability of Soffar's confessions. (citations omitted)

See also, *Alcala* v. *Woodford*, 334 F.3d 862 (9th Cir. 2003), where the failure to investigate a crime scene and secure the services of a criminalist and a forensic pathologist were deemed reversible error based on ineffective assistance of counsel; and *Leonard* v. *Michigan*, 287 F. Supp. 2d 765, 791 (W.D. Mich. 2003), where defense counsel's failure to investigate through consultation with a DNA expert was deemed

a denial of the constitutional right to the effective assistance of counsel.

In this case the funds were available without having to ask for them from the trial court. Trial counsel's failure was an investigatory one. Reasonable professional judgment will not support a failure to explore the need for an expert witness under these facts. *Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Eze* v. *Senkowski*, 321 F.3d 110, 127-132 (2d Cir. 2003); *Powell* v. *Collins*, 332 F.3d 376, 390-392 (6th Cir. 2003); *Kenley* v. *Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

Failure to Object to Junk Science and Prosecutorial Misconduct

Trial counsel also erred in failing to object to the use of luminol testing where no confirmatory testing was done (Issue III, *infra*) and in failing to object to critical prosecutorial misconduct (Issue II, *infra*). The luminol issue is important as this purported evidence must be seen as the most effective information at trial substantiating Mr. Holtzer's involvement in Bruce's murder. There is no other way to explain her blood in his condominium unit. Clearly, however, the luminol testing "evidence" should never have been admitted at Holtzer's trial as it does not establish the presence of blood, has no relevance, and is severely prejudicial. The failure to object to the prosecutor's improper use of this evidence to claim that Bruce's blood was found in Holtzer's condominium unit also

meets the *Strickland* prejudice prong. Nor was trial counsel's conduct in failing to object to the prosecutor's clearly improper remarks when the prosecutor chastised Mr. Holtzer for his arrest silence and for his failure to come forward with his version of events (See Issue II, *infra*) at or above *Strickland's* objective standard of reasonableness. *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005).

The failures of trial counsel must be considered outcome determinative under *Strickland's* prejudice prong. Bringing in a criminalist on transference and to debunk the blood "evidence" would have changed the course of trial as the defense would have broken the back of the primary evidence relied upon by the state – the three hairs and the blood claim. Moreover, elimination of the improper luminol evidence, in addition to a reasonable explanation for the presence of the three hairs, would have eliminated the ability of the prosecution to claim that there was physical evidence of Mr. Holtzer's guilt. The errors of trial defense counsel outlined above denied Mr. Holtzer a fair trial and the writ should be granted. Minimally, this Court should order an evidentiary hearing on this issue which Petitioner three times requested in the state courts and three times was refused.

AEDPA Review Standards

Petitioner raises ineffective assistance of counsel – an issue that was not raised on direct appeal. This issue was thoroughly exhausted in Michigan's

postconviction process and Petitioner asserts that the trial court's substantive treatment of these matters prevents application of a procedural bar. See *Abela v. Martin*, 380 F.3d 915 (6th Cir. 2004). Even if this Court considers a procedural default, Petitioner asserts that he has established cause (through a claim of ineffective assistance of direct appeal counsel, a claim which itself has been completely exhausted in postconviction) and prejudice to excuse the default. *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks v. Straub*, 377 F.3d 538, 551 (6th Cir. 2004).

This Court must look to the last reasoned state court opinion on the point before implementing AEDPA standard of review limitations. The last reasoned state court opinion is the state trial court's Decision and Order Denying Defendant's Motion for Relief from Judgment (attached as Appendix A). This cursory Decision and Order, issued on March 22, 2005, is full of snide comments, irrelevant observations and erroneous statements. It is full of unsupportable and unreasonable determinations of fact, allowing grant of the writ independently under 28 U.S.C. 2254(d)(2) (*See* Issue II, *infra*).

With respect to the IAC issue, the state trial court focuses on the fact that both trial defense counsel were "experienced criminal defense counsel of considerable repute." Unfortunately, experience and reputation do not insulate one from committing constitutionally significant error. It is not who the defense attorney is that matters, it is what that attorney does. The state trial court also seems to be

impressed by the fact that trial counsel were retained, another irrelevant point despite the trial court's incredulity at the "intellectual bankruptcy" of IAC "as a doctrine" due to the fact that "retained counsel seem to commit ineffective assistance with a stunning regularity rarely seen among appointed counsel." The trial court then sets out the Michigan postconviction court rule for half a page and finds, contrary to logic, that Petitioner has shown good cause for failure to raise the issues, presumably including the IAC issue, on direct appeal since they are meritless. The court treats the issue substantively in one conclusory sentence:

> As for "actual prejudice," these alleged irregularities were in fact not improperly handled at trial by counsel or the Court. Decision and Order, Appendix A, p. 2.

Again, the trial court fails to import a procedural bar here, freeing this Court to consider the issue without the need for a showing of cause and prejudice. The state court's substantive treatment of the issue is clearly an unreasonable application of *Strickland*. The state trial court made conclusory claims based on several unreasonable fact determinations. This Court is thus empowered to review this issue *de novo*. See *Maples v. Steagall*, 340 F.3d 433, 437 (6th Cir. 2003); *Wynne v. Renico*, 279 F. Supp. 2d 866, 879 (E.D. Mich. 2003). The writ should be granted.

II. PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL (U.S. CONST. AMENDS. V, XIV) WAS VIOLATED WHEN THE PROSECUTOR ENGAGED IN SEVERE AND REPEATED OUTCOME-DETERMINATIVE MISCONDUCT

The cumulative effect of repeated prosecutorial misconduct denied Mr. Holtzer his due process right to a fair trial. U.S. Const., Ams. V, VI, XIV.

The prosecutor's misconduct exacerbated the prejudice of the evidentiary errors in this case. A defendant's due process right to a fair trial is implicated where the prosecutor resorts to improper and unjust methods. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974). *See also*, *Darden* v. *Wainwright*, 477 U.S. 168 (1986), where the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

When faced with a question of prosecutorial misconduct at trial a reviewing court must decide (1) whether the remarks considered in isolation were improper, and (2) whether, in light of the entire record, the defendant was deprived of a fair trial. *See e.g. United States* v. *Osuorji*, 32 F.3d 1186, 1191 (7th Cir. 1994); *United States* v. *Lindemann*, 85 F.3d 1232, 1244 (7th Cir. 1996). *See also*, in the context of cross-examination misconduct, *Johnson* v. *Wainwright*, 806 F.2d 1479, 1486 (11th Cir. 1987) *cert den* 108 S. Ct. 872 (1987).

A defendant's due process rights are infringed when, as here, a prosecutor's improper comments reach the point where the trial is rendered fundamentally unfair. *Smith* v. *Phillips*, 455 U.S. 209 (1982). *Smith* teaches that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Id.* at 219.

When faced with a question of prosecutorial misconduct at trial a reviewing court must decide (1) whether the remarks considered in isolation were improper, and (2) whether, in light of the entire record, the defendant was deprived of a fair trial. *See e.g. Bates v. Bell*, 402 F.3d 635 (6th Cir. 2005), *United States v. Carroll*, 26 F.3d 1380, 1383-90 (6th Cir. 1994); *United States* v. *Osuorji*, 32 F.3d 1186, 1191 (7th Cir. 1994), *United States* v. *Lindemann*, 85 F.3d 1232, 1244 (7th Cir. 1996). *See also*, in the context of cross-examination misconduct, *Johnson* v. *Wainwright*, 806 F.2d 1479, 1486 (11th Cir. 1987) *cert den* 108 S. Ct. 872 (1987).

In Donnelly, *supra*, Benjamin DeChirstoforo was apprehended for a murder while riding in a car with a dead body and a recently discharged firearm. He complained of comments by the prosecutor expressing a personal belief in guilt and discussing defendant's claimed motives for going to trial. The Court concluded that the comments did not render the trial so fundamentally unfair that due process was denied. In reaching that conclusion the Court suggested that the improprieties claimed might have been "offered to

rebut a somewhat personalized argument by respondent's counsel." *Id.* at 640 (See also Darden, *supra* at 182, excusing "invited" misconduct).

The *Donnelly* court took pains to point out that there was no claim being made in that case that the prosecutor's misconduct "prejudiced a specific right" under the federal constitution. 416 U.S. at 643 (See also, *Darden*, *supra* at 182). Contrast that with the fact that the prosecution in this case impermissibly used Mr. Holtzer's silence against him in direct violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976), a clearly delineated due process violation.

In order to determine whether the prosecutor's remarks infected the trial to the point where a due process denial is found, a reviewing court should take notice of the strength of the state's case. *Coleman* v. *Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986).

Here the state's case was marginal and at least in part based on improper science (Issue III, *infra*). The prosecutor's claim that Kaylee Bruce's blood was to be found throughout Petitioner Holtzer's condominium unit, a claim that was unfounded on these facts, was highly prejudicial and undoubtedly deprived Petitioner of his due process right to a fair trial. As noted in Issue III, *infra*, and in Issue I, *supra*, the presence of two of Mr. Holtzer's hairs in the room where Bruce's body was found and the presence of one of Bruce's hairs in Holtzer's condominium unit is not surprising given the contact and transference aspects inherent in the case facts. Mr.

Holtzer had lived at the Beach Condominiums for several months prior to Bruce's death. Cleaning people were in and out of his unit daily, changing towels and sheets and cleaning Mr. Holtzer's bathroom among other cleaning chores, and they were also entering the room where Bruce's body was found daily. Given the contacts between Holtzer and Bruce and considering the vast number of hairs examined from multiple sources, it is actually surprising that more hairs were not matched in this case, **even if Mr. Holtzer had nothing to do with Bruce's death**.

Considering the above it is clear that the claim that luminol testing revealed blood (specifically Bruce's blood) throughout Mr. Holtzer's condominium unit must be seen as extremely prejudicial and, indeed, outcome determinative. As detailed in Issue I, *supra*, the prosecutor had no reasonable basis upon which to make this constant claim to the jury in Petitioner Holtzer's case. Illuminating this problem further are the misstatements by the trial court on these points in his March 22, 2005 "Decision and Order" (attached as Appendix A) after Petitioner Holtzer's current MCR 6:500 process briefing delineated these matters in substantial detail. Of particular concern are the trial court's comments denying Mr. Holtzer's substantial claim regarding the improper prosecutorial use of alleged blood evidence, evidence that was critical in convicting Mr. Holtzer, that "the DNA testing of the blood on the carpet in Mr. Holtzer's condominium which confirmed that it was human blood . . . " and that there were "luminol

indicated footprints that led from the crime scene to Mr. Holtzer's condominium unit." Decision and Order, 3/22/05, p. 3.

If either of the above quoted statements had a grain of truth, they would be damaging to Mr. Holtzer's claims here. Indeed the trial court placed great reliance on these claims. Unfortunately they are totally false, and clearly constitute an unreasonable determination of fact on this record. With respect to the first statement, as the trial court admits, there was no DNA match to the victim from a stain on the carpet in Mr. Holtzer's condominium unit. The trial court is obviously unaware that DNA testing does not determine what type of bodily fluid created the stain in the first instance. There was no serology testing done here and even the state police technician that testified about the stain admitted that she could not determine whether the stain was blood (T 10/14/99 59-62, 124-128). To blithely state that DNA testing confirmed that this stain was human blood when the opposite point was such a large part of Appellant's argument here is beyond the pale, suggests the state trial court may not have read the briefing, and virtually demands that this Court grant the writ under 28 U.S.C. 2254(d)(2) as this was clearly an unreasonable fact determination.

The second erroneous statement, important in the state trial court's analysis, is farther off base and more damaging in its lack of accuracy. Footprints from the crime scene, the condominium offices, to Mr.

Holtzer's unit, quite some distance, would be damning.

The first problem is that there were no "footprints" at all. There were no shoe patterns, even just outside Mr. Holtzer's unit where police investigators claim that there was a "weak luminescence" luminol reaction (T 10/13/99 70-72). These were small spots in a couple of areas (T 10/14/99 26-30). And, as delineated thoroughly in Issue I, *infra,* many different substances can cause a luminol reaction. A large segment of the path between Mr. Holtzer's condominium unit and the crime scene was outdoors and all attempts to do luminol testing in these areas was unsuccessful (T 10/13/99 72-74). Indeed testing outside the office (the crime scene) with both leucocrystalviolet and luminol revealed no reaction (T 10/14/99 30-32, 61). State police found no blood on the walkway outside the office (T 10/12/99 128).

To claim on this record that the prosecutor's highly damaging and improper comments were rendered fair because there were luminol indicated footprints leading from the crime scene to Mr. Holtzer's condominium unit is nothing short of preposterous and renders the state trial court's entire three page offering useless and, again, based on an unreasonable determination of fact. This Court should grant the writ under 28 U.S.C. 2254(d((2).

If the state trial court and the prosecutor cannot understand these critical evidentiary points, then it is highly likely that the jury was swayed by the

prosecutor's misstatements to convict on this "false positive" claim.

It is impermissible for the prosecutor to argue facts beyond the evidence which was submitted to the jury. *Bell v. Wolfish,* 441 U.S. 520, 533 (1979); *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000). The jury, in determining a defendant's guilt or innocence, may consider only evidence and sworn testimony adduced at trial and may not consider factors which were not introduced as proof. *Bell v. Wolfish, supra.* A prosecutor may not "testify" in closing arguments or through cross-examination to facts which were not introduced as evidence.

When the prosecutor told the jury that Mr. Holtzer had carried Kaylee Bruce's blood back to his condominium, the prosecutor was in effect testifying in argument. No case facts came remotely close to establishing such a claim. As noted in Issue I, *supra,* luminol testing is presumptive only and does not establish the presence of blood. There are a number of other substances that would react to luminol, including vomit that had been treated with cleansing agents and, even if not treated, that contained vegetable matter or horseradish. Very small concentrations of these substances could cause a reaction and the deposit could have been made years in the past. Cleaning personnel walking through the unit with bleach on their shoes could have registered the same reactions to luminol. In short, the luminol testing here, without any confirmatory test, did not establish that any human blood, much less that

Kaylee Bruce's blood, was present in Mr. Holtzer's condominium unit. The claims of the prosecutor in opening and closing argument were baseless and, under these facts, extremely prejudicial. Petitioner Holtzer's due process right to a fair trial under the federal constitution was clearly denied.

The prosecutor in this case did not stop at improperly portraying the blood evidence to Mr. Holtzer's severe detriment. The prosecutor also testified to facts not in evidence, crucial facts indeed, when, without any basis, he told the jury that several pubic hairs, not matched to Petitioner Holtzer or to Bruce, found in the body wraps that were placed around Bruce's body by evidence technicians at the scene, came from Darlene Wilson (T 10/21/99 67).

The prosecutor obviously made this claim, with no basis in testing, to deflect attention and concern from these unidentified hairs that the jury could reasonably conclude, under these facts, could have belonged to the actual assailant or, conversely, could lend credence to the notion that the presence of two of Mr. Holtzer's pubic hairs in the same setting did not contain much probative value. By linking the hairs to Mr. Holtzer, the prosecutor negated both of these theories. The only problem here was that the prosecutor had absolutely no basis for making this linkage. What the prosecutor should have done was to arrange for testing of the hairs in question against those of Darlene Wilson. Why the prosecutor did not do this would be the subject of sheer speculation. Possibly there was reason to fear the result of such

testing. We will likely never know. What is known is that it was far easier to make the claim without support. And making this claim without support under these facts constituted a denial of Mr. Holtzer's due process right to a fair trial under the state and federal constitutions.

Finally, the prosecutor's elicitation of the fact that Mr. Holtzer was silent upon arrest (T 10/13/99 75) and the prosecutor's claims in argument that Petitioner Holtzer's failure to question the police on the morning of the discovery of Bruce's body and his failure to go to police to question them when he found out he was wanted for murder (T 10/21/99 14, 20) should be considered as evidence of guilt, were clearly impermissible.

A defendant's silence at arrest is protected conduct and cannot be elicited by the prosecution to suggest guilt. *Doyle v. Ohio*, 426 U.S. 610 (1976). The prosecutor's reference to Petitioner's failure to come forward with his version of events at any time prior to trial crosses the *Doyle* line – Petitioner Holtzer was under no obligation to assert his innocence before trial. The United States Supreme Court has clearly held that the use of a defendant's post arrest silence to suggest guilt is a violation of a defendant's right to due process of law under the Fourteenth Amendment.

This issue was thoroughly exhausted in Michigan's postconviction process and Petitioner asserts that the trial court's substantive treatment of these matters prevents application of a procedural bar. See

Abela v. Martin, 380 F.3d 915 (6th Cir. 2004). Even if this Court considers a procedural default, Petitioner asserts that he has established cause (through a claim of ineffective assistance of direct appeal counsel, a claim which itself has been completely exhausted in postconviction) and prejudice to excuse the default. *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004).

The state courts made conclusory claims based on several unreasonable fact determinations. This Court is thus empowered to review this issue *de novo.* See *Maples v. Steagall*, 340 F.3d 433, 437 (6th Cir. 2003); *Wynne v. Renico*, 279 F. Supp. 2d 866, 879 (E.D. Mich. 2003). The cumulative effect of the prosecutorial misconduct was substantial and outcome determinative. Mr. Holtzer's federal due process right to a fair trial was denied and the writ should be granted.

III. PETITIONER HOLTZER WAS DENIED HIS FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL (U.S. CONST., AMS. V, XIV) WHERE SCIENTIFICALLY UNSOUND LUMINOL TESTING WAS IMPROPERLY USED TO MAKE THE UNRELIABLE AND HEAVILY PREJUDICIAL CLAIM THAT THE BLOOD OF THE VICTIM WAS FOUND IN HIS CONDOMINIUM UNIT.

Criminal defendants possess a due process right to a fair trial, which may be denied by improper evidentiary rulings. *See* U.S. Const., Ams. V, XIV. *See* also *Walker v. Engle,* 703 F.2d 959, 962-63 (6th

Cir.1983). State court evidentiary violations may rise to the level of a federal constitutional deprivation by rendering a trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62 (1991), *Crane v. Kentucky*, 476 U.S. 683 (1986). *Rosario v. Kuhlman,* 839 F.2d 918, 925 (2d Cir. 1988). In this case junk science was improperly introduced to dramatically sway the jury on key points, denying Petitioner Holtzer due process of law under the federal constitution.

As detailed in the Statement of Facts, *supra,* the prosecutor used luminol testing to tell the jury that there was "blood" in Petitioner Holtzer's condominium unit, a key piece of the prosecutor's case against Mr. Holtzer. The prosecutor flatly stated that the glow from the luminol indicated "that blood was there" (T 10/11/99 190). The prosecutor claimed that blood was found throughout Petitioner Holtzer's apartment and even outside on his deck. The prosecutor, in a twist of logic, suggested that because DNA was extracted from a stain sample on a rug in Mr. Holtzer's condominium unit and because the stain reacted to luminol, it was proven that there was blood on the rug (T 10/11/99 192-193).[11]

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[11] In fact it appears there was no serology testing done to determine the presence of blood (T 10/14/99 59-62, 124-128). Other bodily fluids (semen) can in fact react with luminol (see discussion, infra) and even vomitus on the rug, if it had been treated with a cleaning agent, or if it contained vegetable matter or horseradish, would provide DNA and react to luminol.

The prosecutor concluded his opening statement with a claim that Mr. Holtzer "took Kaylee Bruce's blood with him to his condominium" (T 10/11/99 197).

The testimony of MSP forensic scientist Connie Swander and vice president and senior director at LabCorp Marcia Eisenburg (T 10/14/99 20-28, 57, 59-64, 116-117, 124-128) did not support the prosecution's assertions, and established that no confirmatory testing had been done on the stains in Mr. Holtzer's condominium, which had reacted to luminol and had been claimed as blood.

In closing argument the prosecutor stated:

> Now, there is also something that he couldn't get rid of, not then, and not in this trial, the blood in his condo, human blood in his condominium. The blood on the brown rug, just the brown rug, that's the first thing inside his condominium, three different places where Luminol glowed when tested by Connie Swander. And I'm going to get to Luminol, and whether that's blood in a minute.
>
> **But what we had on that rug, and how you can leave blood stains on a rug, are by stepping on the rug.**
>
> . . . **[A]nd the Luminol glows only where there's blood,** or some element that it reacts with, but that's what she saw.
>
> Now, following that, inside of the condominium we had more Luminol reactions. And

these again could not be developed to show footprints, but there was a pattern, full dimensional patterns, not drops, not splatters, not like something spilled, and they were in an order which suggested a stride. . . .

Well, you know, the first question you ask is, what's blood doing there?

And it's blood on the brown rug, because it was capable of giving a DNA extraction. Now, someone might want to argue it's saliva, or some other fluid, but this is where you have to start employing your own common sense. There's DNA in that stain that it reacted to Luminol. Luminol glows when it contacts blood. The stain that glowed showed DNA. Doesn't that equal a blood stain, just by use of your common sense?

Now, the question is, whose blood is it? . . . Three alleles means there's more than one person's blood there, more than one person's DNA. (T 10/21/99 26-28).

The misconduct of the prosecutor in this regard is treated separately in Issue II, *supra*.

Michigan has not accepted luminol testing as sound science, for obvious reasons. The only reference to luminol that could be found in Michigan cases was a fleeting one in passing in *People v. Gearns & Thomas*, 577 N.W.2d 422 (Mich. 1998), *overruled on other grounds People v Lukity*, 596 N.W.2d 607 (Mich.

1999). Other courts and commentators across the country have given extensive attention to luminol testing, however, and have found it unreliable, and in many instances highly prejudicial and inadmissible, when confirmatory testing is not done.

Luminol is a chemiluminescent compound used as a **presumptive,** catalytic test for the presence of blood. William G. Eckert, M.D. & Stuart H. James, *Interpretation of Bloodstain Evidence at Crime Scenes* (2d Ed. 1993) pp. 120-121. Luminol is used by spraying the chemical "on objects or areas containing traces of suspected bloodstain. A bluish-white luminescence or light production on the suspected area is a positve test. The luminescence must be observed in the dark." *Id.* at 121.

Though luminol can react to heme, which is an iron-type substance in human and animal blood, it can also react to the chemicals contained in metallic paint, the aloe in lotions, and substances containing chlorine or chlorine derivatives. "The major sources of false-positive reactions [to luminol] include chemical oxidants, catalysts, and salts of heavy metals such as copper and nickel. Some examples of common substances that may produce false-positive reactions include iodine, household bleaches, rust, and formalin, as well as plant peroxidases as found in horseradish, citrus fruits, bananas, watermelon, and numerous vegetables." *Id.* at 122. As with other catalytic tests, luminol "should be generally characterized as nonspecific for blood and . . . requires confirmatory testing to meet a rigorous standard of proof for the

presence of blood. Catalytic tests do not differentiate between human and animal blood." *Id.*

The first known case examination of luminol was reported in *People v. Watson*, 288 P.2d 184 (Cal. App. 1956), *vacated on other grounds* 299 P.2d 243 (Cal. 1956), *cert denied sub nom Watson v. Teets*, 355 U.S. 846 (1957). Since then a number of courts have ruled that luminol is not accepted as a positive test for blood as it also reacts to the presence of other substances. *Ex parte Mowbray*, 943 S.W.2d 461, 463 (Tex. App. 1996).

As do Eckert and James, noted *supra,* courts in several states have stated that luminol reacts with other substances, including semen, cleaning agents, certain metals and vegetable matter, animal blood, horseradish and rust. *People v. Wooten*, 725 N.Y.S.2d 767 (S. Ct. N.Y 2001); *Brenk v. State*, 847 S.W.2d 1 (Ark. 1993); *Harris v. State*, 133 S.W.3d 760 (Tex. App. 2004); *State v. Fukusaku*, 946 P.2d 32 (Haw. 1997).

In *Brenk v. State, supra* at 8, the court held:

> Luminol testing is only a preliminary test which indicates the possible presence of blood. Evidence presented at the hearing on the motion in limine established that luminol testing is unable to indicate the definite presence of blood, much less determine whether any blood present is human or animal. Luminol testing is done by spraying a luminol reagent on the item or in the area to be tested. Luminol reacts with certain

> metals and vegetable matter as well as blood, animal and human, to give off a light luminescent watch dial. It is impossible to tell without follow up testing which of the possible reactants is causing the reaction. Further testing is necessary to determine whether what caused the reaction is actually blood and whether, if blood, it is animal or human blood. Luminol testing, without any additional testing, is unreliable to indicate the presence of human blood. Additionally, luminol is not time specific. That is, a reaction will occur even many years after a reacting substance has been in place, so it is impossible to tell how long the substance that is causing the reaction has been in place.

The *Brenk* Court concluded that:

> [L]uminol tests done without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime . . . [I]t was error for the trial court to admit the evidence of luminol testing done by Mr. Smith where there was no follow-up testing done to establish that the substance causing the luminol reaction was, in fact, human blood related to the alleged crime. *Id.* at 9.

The *Brenk* court found that the relevance deficiencies of luminol testing demanded elimination of this evidence **even where the jury is clearly told**

that a luminol reaction indicates only the possibility of blood:

> [Luminol evidence] was likely to be misleading and confusing to the jury, such that **even the cross-examination** establishing that what caused the reaction in the photos and the areas where no photos were introduced was only possibly blood **cannot cure the prejudice that certainly resulted**. *Id.* at 9-10, emphasis added.

Other courts have agreed that luminol testing is too prejudicial in light of its minimal probative value, **even if a jury is aware of the limitations of the test**. *Young v. State*, 871 S.W.2d 373 (Ark. 1994). See also, *State v. Fukusaku, supra.*

With respect to the general issue of relevance, the Connecticut Supreme Court, in *State v. Moody,* 573 A.2d 716 (Conn. 1990), has indicated that presumptive blood testing is sorely lacking:

> [T]he result of the "presumptive test for blood" had no probative value whatsoever. The test result did nothing toward establishing the likelihood of the presence of human blood on the sole of the defendant's shoe. Therefore, we hold that the test result was entirely irrelevant, and thus, the trial court abused its discretion by admitting it into evidence. *Id.* at 722.

In *United States v. Hill,* 41 M.J. 596 (A.C.C.A. 1994) the court, after an extended analysis, determined that luminol testing is reliable and admissible

under the United States Supreme Court's definitive pronouncement on admissibility of "scientific" evidence in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) **only if confirmatory tests are conducted**:

> The record clearly demonstrates that all four of the safeguards discussed by the Supreme Court in *Daubert* to evaluate whether an expert's scientific testimony rests on a reliable foundation were met in this case. However, the evidence indicated that luminol is reliable only to show a presumptive positive presence for blood and not to confirm the presence of blood. We find that the government, as the party offering the expert testimony, failed to meet the *Daubert* reliability standard for the admission of expert testimony because it showed no more than that a luminol test reveals only the presumptive positive presence of blood. Accordingly, we hold that the military judge erred in admitting the expert testimony on luminol testing of the Petitioner's PT uniform to show that there was blood on it. *Hill, supra* at 602.

In the case at bar, there can be no doubt that the prosecutor utilized luminol testing to prove to the jury that not only human blood, but specifically Kaylee Bruce's blood, was in Petitioner Holtzer's condominium – indeed that her blood had been

"tracked" through his condominium.[12] Though some direct and cross-examination of MSP forensic scientist Swander suggested the presumptive nature of the testing here (See T 10/14/99 20-21, 59-62), the import of these brief references were buried under an avalanche of prosecutorial claims that the luminol testing showed clearly "that blood was there" and "that Mr. Holtzer took Kaylee Bruce's blood with him to his condominium."

Before concluding it should be noted that MSP Forensic Scientist Connie Swander misled the jury when she claimed that reactions to a leucocrystal-violet test on two "very small" stains on Petitioner's deck, stains which were "actually worked into the wood," were in fact specific for blood (T 10/14/99 61). It seems Swander's claims in this respect were not accurate. According to the *Sourcebook in Forensic Serology, Immunology, and Biochemistry*, by R.E. Gaensslen, Ph.D., August, 1983, distributed by the U.S. Department of Justice, National Institute of Justice, Leucocrystal Violet reacts with "many chemical oxidants" and thus is "not more specific for blood than most of the other catalytic tests." See

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[12] This clear misstatement of the evidence also constitutes reversible prosecutorial misconduct (See Issue II, *supra*). Of particular import are the unforgivable misstatements by the trial court on these points in his March 22, 2005 "Decision and Order" after Petitioner Holtzer's state postconviction briefing delineated these matters in substantial detail. See discussion on this point in Issue II, *supra*. If the trial court and the prosecutor can't get this, it is unlikely the jury did.

pertinent sections of the *Sourcebook*, attached as Appendix F. This critical misstatement by Swander, which suggested to the jury that there could have been nothing other than bloodstains on Petitioner Holtzer's deck, was sufficient in and of itself to require the grant of a new trial.

This impermissible evidence clearly denied Mr. Holtzer's federal due process right to a fair trial because of its critical significance. Even if it is agreed that two of Mr. Holtzer's pubic hairs were found in the room where Kaylee Bruce was found dead and that one of her head hairs was found in his condominium, the reality is that given the transference possibilities[13] and given the number of unidentified hairs found, **including pubic hair**, at the crime scene, and the hundreds of hairs recovered from various areas at issue and tested or examined, this evidence was not substantially probative of guilt – **despite** the attention given to the hairs in relation to mitochondrial DNA testing. However, there could be

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[13] See issue I, *supra*, where the transference issue is covered in detail in the course of an argument that Mr. Holtzer's trial counsel was ineffective for not investigating and bringing in a qualified criminalist to testify on this point. The bottom line is that it is highly likely that Mr. Holtzer's hairs could have ended up in areas of the Beach Condominiums frequented by him and by members of the cleaning crew who were regularly in his unit through entirely innocent means. And the areas involved include the room where Bruce's body was found. Likewise it is likely that one of Bruce's hairs could have ended up in Holtzer's unit innocently given her interaction with him over the months that he lived at the Beach Condominiums where she worked.

no innocent explanation for finding Kaylee Bruce's blood traipsed through Mr. Holtzer's condominium unit and out onto his deck. As demonstrated, luminol testing is incapable of determining this fact. The manner in which this evidence was used clearly demands the grant of a new trial.

The state trial court dealt with this issue in one cursory sentence on p. 3 of its Decision and Order (Appendix A):

> While there was testimony that luminal testing is not foolproof, as it can produce positive results from things other than blood, we have the DNA testing of the blood on the carpet in Mr. Holtzer's condominium which confirmed that it was human blood and indicated there may have been two sources of that blood, one of which could have been Kaylee Bruce.

Of course, the primary problem here is that the state trial court, as noted repeatedly in this brief, is in error when he states that DNA testing confirmed human blood. Thus the entire premise of his argument is lost. This is clearly an unreasonable fact determination under 28 U.S.C. 2254(d)(2). Moreover, even if it carried logic, the state trial court's determination is an unreasonable application of clearly established federal law as determined by the United States Supreme Court. As the Court established in *Daubert, supra,* junk science in the courtroom can deny due process. *See* also, *United States v. Scheffer,* 523 U.S. 303 (1998) where the court held that

determinations "clothed . . . in scientific expertise," when lacking in reliability, are extremely problematic. *Id.* at 313. Such evidence "can lead jurors to abandon their duty to assess credibility and guilt." *Id.* at 314. This had to be the impact of this highly unreliable and misstated evidence which purported to link Petitioner Holtzer directly with the victim in this case.

This issue was thoroughly exhausted in Michigan's postconviction process and Petitioner asserts that the trial court's substantive treatment of these matters prevents application of a procedural bar. See *Abela v. Martin,* 380 F.3d 915 (6th Cir. 2004). Even if this Court considers a procedural default, Petitioner asserts that he has established cause (through a claim of ineffective assistance of direct appeal counsel, a claim which itself has been completely exhausted in postconviction) and prejudice to excuse the default. *Murray v. Carrier,* 477 U.S. 478, 495 (1986); *Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004).

The state courts made conclusory claims based on several unreasonable fact determinations. This Court is thus empowered to review this issue *de novo.* See *Maples v. Steagall*, 340 F.3d 433, 437 (6th Cir. 2003); *Wynne v. Renico*, 279 F. Supp. 2d 866, 879 (ED. Mich. 2003). The writ should be granted.

IV. PETITIONER HOLTZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AM. VI) WHERE HIS APPELLATE COUNSEL NEGLECTED STRONG, CRITICAL ISSUES WHICH MUST BE SEEN AS SIGNIFICANT AND OBVIOUS.

A criminal defendant has a right to the effective assistance of counsel in his appeal of right to the Michigan Court of Appeals. *Ross v. Moffitt,* 417 U.S. 600, 610 (1974), *Coleman v. Thompson,* 501 U.S. 722, 756 (1991), *Evitts v. Lucey,* 469 U.S. 387, 391-400 (1984), *People v. Reed,* 535 N.W.2d 496 (Mich. 1995).

The *Strickland* standard is generally utilized[14] and deference, though certainly not unlimited, is afforded to counsel's decisions. The Supreme Court has recognized that a criminal Petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). However, courts have routinely insisted that *Strickland* mandates that appellate counsel have sound strategic reasons for failing to raise important and obvious appellate issues, or "dead bang winners." *Smith v. Murray,* 477 U.S. 527, 536 (1986), *Manning v. Huffman,* 669 F.3d 720 (6th Cir. 2001), *United States v. Cook*, 45 F.3d

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[14] A key concern in this context is whether counsel's errors "have undermined the reliability of and confidence in the result." *McQueen v. Scroggy,* 99 F. 3d 1302, 1311 (6th Cir. 1996).

388, 395 (10th Cir. 1995), *Houston v. Lockhart,* 982 F.2d 1246 (8th Cir. 1993), *Page v. United States,* 884 F.2d 300 (7th Cir. 1989).

In *Mapes v. Coyle,* 171 F.3d 408, 427-28 (6th Cir. 1999), the court set out a variety of factors to be assessed in making the determination of whether appellate counsel rendered effective assistance. Key questions are whether the omitted issues were significant and obvious, whether the omitted issues were stronger than the issues presented, whether there were objections at trial to the omitted issues, and whether Petitioner and appellate counsel met to discuss possible issues. See also, *Mapes v. Tate,* 388 F.3d 187 (6th Cir. 2004).

Appellate defense counsel was ineffective for failing to raise the three issues earlier outlined in this brief. All three errors were open and obvious, were stronger than the issues presented on direct appeal and were far from frivolous. Issue III concerns the inadmissibility of highly damaging evidence, evidence which improperly claims the presence of the victim's blood in Mr. Holtzer's condominium unit. Scientific evidence with critical import should always be assessed on appeal and failure to do so here undoubtedly constitutes ineffective assistance of appellate counsel.

Issue II focuses on the prosecution's misuse of the improper luminol evidence outlined in Issue I and the prosecutor's erroneous use of Petitioner's Holtzer's silence at arrest and his failure to come forward to

provide statements to police. Again, these errors were outcome determinative and plainly obvious. The failure to assert these issues on direct appeal must be considered error after analysis under both prongs of *Strickland.*

Finally, the errors of trial counsel (Issue I) in failing to object to the improper evidence and argument outlined in Issues II and III, and in failing to investigate and retain a criminalist on transference and blood evidence were important and obvious issues that would have changed the course of the direct appeal. The ineffectiveness of Mr. Holtzer's appellate counsel provides the cause under the standards pertaining to postconviction review, the prejudice is laid out in the issues previously discussed, *infra,* and the writ should be granted.

V. ASSUMING ARGUENDO THAT THE STANDARD OF REVIEW SET FORTH IN 28 U.S.C. §2254(D)(1) PRECLUDES RELIEF IN THIS ACTION, THE COURT SHOULD NOT APPLY THAT STANDARD BECAUSE IT IS UNCONSTITUTIONAL, AND THE COURT SHOULD GRANT THE WRIT UNDER A DE NOVO STANDARD OF REVIEW.

As set forth in great detail above, Petitioner Holtzer is plainly entitled to relief under the standards of review set forth in 28 U.S.C. §2254(d)(1). In the event this Court holds otherwise, Mr. Holtzer would still be entitled to relief because the standards

of review set forth in that statute are unconstitutional. *See Irons v. Carey,* 408 F.3d 1165 (9th Cir. 2005) (ordering supplemental briefing on the very substantial questions concerning the constitutionality of the standard of review provisions of 28 U.S.C. §2254(d)(1)). Because Petitioner believes that he is clearly entitled to relief under the standard of review set forth in 28 U.S.C. §2254(d)(1), he has set forth his arguments challenging the constitutionality of that statute as succinctly as possible.

28 U.S.C. §2254(d)(1) limits the adjucative powers of the federal courts in two separate respects. First, it sharply restricts the source of law that a federal court may apply in ruling upon a petition for a writ of habeas corpus. *See* 28 U.S.C. §2254(d)(1) (writ may be granted only if state court decision was contrary to United States Supreme Court determination of federal law). Second, it prevents a federal court from remedying a violation of a petitioner's constitutional rights unless the violation involved a truly unreasonable application of federal law – as opposed to an incorrect application of federal law. These limits are unconstitutional in several respects.

First, the limitations violate the doctrine of separation of powers. As the United States Supreme Court held long ago in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." Accordingly, once Congress confers jurisdiction upon the federal courts to resolve particular matters, the courts must independently determine what the

federal constitutional law is and how to apply it. *See Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 430 (1995); *Yakus v. United States,* 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting). 28 U.S.C. §2254(d)(1) violates the separation of powers by requiring federal courts to ignore longstanding and otherwise binding Circuit precedent when ruling upon habeas petitions. The statute, in short, unduly infringes upon the power of the federal courts to determine "what the law is" and impermissibly prevents federal courts from adhering to principles of *stare decisis. See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down Religious Freedom Restoration Act because, inter alia, the statute represented an impermissible attempt by Congress to displace judicial precedent).

Second, the limitations in 28 U.S.C. §2254(d)(1) violate the Supremacy Clause of the United States Constitution. Federal courts play an essential role in enforcing the Supremacy Clause by denying effect to state judicial decisions that conflict with the United States Constitution and by thus maintaining the uniformity and supremacy of federal law. Indeed, the Supreme Court has repeatedly rebuked efforts of state courts to encroach upon the federal judicial power. *See, e.g., Abelman v. Booth,* 62 U.S. (21 How.) 506 (1858) (rejecting effort by Wisconsin Supreme Court which, in effect, revised a federal court decision concerning constitutionality of the Fugitive Slave Act); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) (rejecting effort by Virginia Supreme Court to revise judgment of federal court deemed to be

erroneous). 28 U.S.C. §2254(d)(1) violates the Supremacy Clause by preventing federal courts from denying effect to an entire class of state court decisions that conflict with federal law – i.e., that class of cases in which the state court decision is wrong as a matter of federal constitutional law, but not unreasonably wrong.

Third, 28 U.S.C. §2254(d)(1) unconstitutionally requires a federal court to issue advisory opinions that may not be enforced. Under the statute, a federal court's conclusion that a state court wrongly (but not unreasonably) applied the Constitution has no more weight than a mere opinion; it binds nobody and affords relief to nobody. As such, it is a classic advisory opinion that is squarely precluded under Article III of the Constitution. Congress plainly may not require federal courts to issue such unenforceable decisions, nor may Congress prevent a federal court from giving dispositive effect to its decision that a state prisoner is being unconstitutionally detained.

Fourth, the standard of review set forth in 28 U.S.C. §2254(d)(1) violates the Due Process Clause of the Fourteenth Amendment. As Justice Brennan explained in *Fay v. Noia*, 372 U.S. 391, 401-05 (1963), *overruled in part by Wainwright v. Sykies,* 433 U.S. 72 (1973), "habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of denials of due process is precisely its historic office. . . ." The standard of review in 28 U.S.C. §2254(d)(1) expressly prevents federal courts from remedying a whole class of due process

violations (i.e., those in which a state court has wrongly, but not unreasonably, applied constitutional guarantees to state defendants), and in so doing it runs afoul of the Due Process Clause.

Finally, the strictures set out in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), as codified in 28 U.S.C. §2254(d)(1), violate Article I, Section 9 of the federal constitution because they effectively suspend the writ of habeas corpus. See the discussion on this point by Judge Merritt of the United States Court of Appeals for the Sixth Circuit in his dissenting opinion in *Davis v. Straub*, 430 F.3d 281 (6th Cir. 2005).

In conclusion, the fundamental constitutional errors in the state court proceedings warrant relief under any standard of review, but if for any reason this Court holds that Petitioner Holtzer is not entitled to relief under the standard set forth in 28 U.S.C. §2254(d)(1), it should review Mr. Holtzer's claims under *a de novo* standard and should grant a writ of habeas corpus.

RELIEF REQUESTED

WHEREFORE, Petitioner Kevin Carter Holtzer requests that Respondent be required to appear and answer the allegations of this Petition, that after full consideration, this Court relieve Petitioner Holtzer of the unconstitutional restraint on his liberty, and that this Court grant such other, further and different relief as the Court may deem just and proper under

the circumstances, as well as grant oral argument and an evidentiary hearing in this matter.

Respectfully Submitted,

By: /s/ F. Martin Tieber

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Dated: June 5, 2006

APPENDIX A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GRAND TRAVERSE

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN CARTER HOLTZER,

Defendant-Appellant.

File No. 98-7603-FC
HON. THOMAS G.
POWER

Alan R. Schneider (P32121)
Attorney for Plaintiff-Appellee

F. Martin Tieber (P25485)
Attorney for Defendant-Appellant

DECISION AND ORDER
DENYING DEFENDANT'S MOTION
FOR RELIEF FROM JUDGMENT

This matter comes before the Court on Defendant's Motion for Relief from Judgment. He was convicted of first-degree murder and sentenced to life in prison after a trial, being represented by Larry C Willey, Esq. and James M. Hunt, Esq., experienced criminal defense counsel of considerable repute. Mr. Holtzer's conviction was then affirmed by the Court of Appeals and the Supreme Court denied leave to

appeal. On appeal he was represented by counsel with whom this Court is unfamiliar. All counsel were retained by the Defendant; none were appointed counsel. As is altogether too common, retained counsel seem to commit ineffective assistance with a stunning regularity rarely seen among appointed counsel representing felony defendants. Perhaps that has more to do with the intellectual bankruptcy of "ineffective assistance of counsel" as a doctrine than with the conduct of the defense attorneys.

Entitlement to relief on the Motion for Relief from Judgment is governed by MCR 6.508(D)(3) which states:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this

> subrule, "actual prejudice" means that,
>
> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
>
> (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

The first consideration is whether there was "good cause" for failure to raise the issues discussed by Defendant at trial and on appeal. Because those issues are meritless, it would be pointless to raise them on appeal. This constitutes good cause for

failing to do so. As for "actual prejudice," these alleged irregularities were in fact not improperly handled at trial by counsel or the Court. Hence there is no "reasonably likely chance of acquittal" as required by the Court rule.

Indeed, this Court probably erred in refusing to permit the prosecution to introduce evidence of Mr. Holtzer's conviction for viciously beating another woman he had never met and leaving her near death. See *People of the State of Michigan v Holtzer*, Grand Traverse Circuit Court File No. 98-7655-FH, aff'd December 28, 2001, Court of Appeals Docket No. 217478 (unpublished), leave denied October 16, 2002, Supreme Court File No. 120806. The prosecution requested this evidence for use at the Holtzer trial, pursuant to MRE 404. This Court declined. The theory was that this showed the Defendant's scheme, plan or system of viciously beating isolated women who were strangers. Given recent decisions under MRE 404(b), that rule of evidence now does little more than provide a slightly heightened rule of relevance under MRE 401. The Defendant's conviction of a similar vicious beating of a woman he did not know would likely be admitted should there be a re-Trial. The Defendant would have no "reasonably likely chance of acquittal."

Defendant's motion objects to the use of luminol testing to show the presence of blood in the Defendant's condominium unit. Defendant also objects to the Prosecutor's argument that the blood belonged to Kaylee Bruce. While there was testimony that

luminol testing is not fool proof, as it can produce positive results from things other than blood, we have the DNA testing of the blood on the carpet in Mr. Holtzer's condominium which confirmed that it was human blood and indicated there may have been two sources of that blood, one of which could have been Kaylee Bruce. The Prosecutor argued that this was Kaylee Bruce's blood based not solely on the luminol testing, but also based on the whole circumstances of the case including the luminol indicated footprints that led from the crime scene to Mr. Holtzer's condominium unit. This is fair comment on the evidence.

The Defendant argues "the prosecutor engaged in severe and repeated outcome-determinative misconduct." The items listed either did not occur or represent fair comment on the evidence. To the extent there is any merit in any of those claims, they were insignificant.

Defendant argues his attorney should have hired an expert witness called a "criminalist" to testify about the fact that human hairs rub off and could be moved around by many forms of innocent contact. This Court has never heard of a "criminalist" as a discipline and questions whether one could be an expert witness usable to testify to something that is obvious to lay jurors – that human hairs slough off and, being light and clingy, are easily transported from place to place. This was pointed out to the jury by counsel. The jury was well aware of the point and, indeed, the prosecution felt compelled to respond to it

in argument. Failing to hire a paid "expert" to testify to the obvious did not constitute "ineffective assistance of counsel."

The Defendant's Motion for Relief from Judgment is denied.

IT IS SO ORDERED.

/s/ Thomas G. Power
HONORABLE
THOMAS G. POWER
Circuit Court Judge

Dated: 3/22/05

APPENDIX B

Court of Appeals, State of Michigan

ORDER

People of MI v Kevin Carter Holtzer		Michael J. Talbot Presiding Judge
Docket No.	261940	E. Thomas Fitzgerald
LC No.	98-007603-FC	Michael R. Smolenski Judges

The Court orders that the application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

/s/ Michael Talbot
Presiding Judge

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 14 2005
Date

/s/ Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

May 30, 2006

130003

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KEVIN CARTER HOLTZER,
Defendant-Appellant.

SC: 130003
COA: 261940
Grand Traverse CC:
98-007603-FC

/

On order of the Court, the application for leave to appeal the October 14, 2005 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 30, 2006 /s/ Corbin R. Davis
Clerk

APPENDIX C

[LOGO] **Forensic Science Associates**

3053 Research Drive, Richmond, CA 94806
FAX (510) 222-8887
(510) 222-8883

REPORT

REVIEW OF CRIME SCENE HAIR AND BLOOD STAIN EVIDENCE

re: Kevin C. Holtzer
Supreme Court No. 123477
Court of Appeals No. 223984
Circuit Court No. 98-7603-FC
Our File 04-339

Prepared for

F. Martin Tieber
Attorney at Law

December 1, 2004

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REPORT

REVIEW OF CRIME SCENE HAIR AND BLOOD STAIN EVIDENCE

re: Kevin C. Holtzer
Supreme Court No. 123477
Court of Appeals No. 223984
Circuit Court No. 98-7603-FC
Our File 04-339

BACKGROUND

The body of Kaylee Bruce was found in the office area of the Beach Condominiums in Traverse City, Michigan. She had suffered a beating, and died as a result of her injuries. Kevin Holtzer, a resident of one of the residential units at Beach Condominiums was charged and convicted of the murder of Ms. Bruce. Some of the evidence presented at Mr. Holtzer's trial included three hairs, two found in the office area and determined to be Mr. Holtzer's and one found in his apartment and found to be Ms. Bruce's. Further evidence was presented that areas in Mr. Holtzer's apartment tested positive using the luminol presumptive test for blood.

This report reviews the reports and laboratory records regarding the examination of the hair evidence in this case, and the luminol testing. The significance of this evidence is discussed.

EVIDENCE

This report is based on review of the documents listed below. No physical evidence was examined.

BACKGROUND INFORMATION

The following documents were received for relevant background information:

1. "Holtzer Fact Statement on Hair Transference"
2. Michigan State Police Laboratory Report, John Lucey, Jennifer Stites, Connie Swander and James Sullivan, completed 2/26/1998
3. Handwritten notes related to work reported in the Laboratory Report dated 2/26/1998
4. Michigan State Police Laboratory Report, Connie Swander, completed 11/30/1998
5. Michigan State Police Laboratory Report, Connie Swander, completed 1/11/1999
6. Handwritten examination notes related to work reported in Laboratory Reports of 11/30/1998 and 1/11/1999

REVIEW OF DOCUMENTS

The documents which were reviewed do not provide specific identification of which hairs were determined to be Mr. Holtzer's and which were Ms. Bruce's. The discussion below is, therefore, directed generally to the question of the relevance of hair

evidence and various considerations which must be addressed in determining the value of hair as evidence in this case.

Human hair is ubiquitous in most areas of human habitation. Except in unusual situations, all people have hair, and the natural growth cycle of hair causes a substantial number of hairs to be shed every day. Hairs are reasonably impervious to environmental degradation, but are subject to mechanical damage from, for example, being stepped on, hairs may be partially eaten by certain pests, or they may be physically removed from a location either intentionally during cleaning or unintentionally by a variety of processes.

Particularly with the advent of reasonably definitive DNA analysis, the ability to determine that a hair comes from a specific individual has increased the value of hair as evidence in many types of incident investigations, As with any evidence, however, the value of hair evidence is determined both by establishing the origin of the hair, and by establishing how the hair is related to the incident being investigated. In the context of a typical criminal investigation, it is necessary to establish independently that the hair is from the perpetrator and that the hair is from the defendant. Knowing one does not provide evidence for the other.

Hair identified as Ms. Bruce's and Mr. Holtzer's

Three hairs were recovered and represented at trial as providing evidence of Mr. Holtzer's involvement in the homicide: Two pubic hairs identified as Mr. Holtzer's were recovered from the area in which Ms. Bruce's body was found, and one head hair identified as being from Ms. Bruce was found in Mr. Holtzer's apartment. One of the two pubic hairs was found attached, in some unknown fashion, to a core from a tire air valve that was found a few feet from Ms. Bruce's body, and the other pubic hair was found adhering to Ms. Bruce's abdomen. The exact location in the defendant's apartment from which the head hair of Ms. Bruce was recovered is not described in the documents reviewed.

There is nothing about any of these hairs to provide strong evidence that they were shed during the commission of the crime by either the perpetrator or Ms. Bruce. Without showing that the hairs were shed during the activity resulting in Ms. Bruce's death, the hairs can, at best, establish that Mr. Holtzer was in the office area of the Beach Condominiums, and Ms. Bruce was in the defendant's apartment, at some time in the past. Alternative explanations for the presence of these hairs where they were found can also be postulated.

For an extended period of time prior to the date of the homicide Ms. Bruce was working, and Mr. Holtzer was living, at the Beach Condominiums. The presence of the defendant in the general area of the

offices of the Beach Condominiums, and the possible presence of Ms. Bruce in or near the defendant's apartment, on multiple occasions in the time preceding the homicide must be assumed. On any of these occasions each individual could have shed a hair or lost a hair from his or her clothing. Although careful microscopic examination might reveal damage to the hair that suggests the hair has been present at a scene for a period of time, the absence of such damage does not prove that the hair was recently shed.

Furthermore, given the use of the area in which the crime apparently occurred (an area frequented by all of the workers in the facility), and the frequent movement of workers throughout the facility, the possibility that hairs could have been inadvertently transferred from one area to another must be considered. As hairs are shed they may adhere to clothing, fall on bedding or other items, land on the floor and be picked up on shoes or during maintenance operations. Movement of people, furnishings, maintenance equipment, or laundry during the daily activities in the facility provide opportunity for hairs to be moved from one place to another within the facility.

The two pubic hairs found in the office area require particular consideration. The hair found on the Ms. Bruce's abdomen could have been present in the area in which the incident occurred by any of the mechanisms described above. In the struggle that resulted in her death, Ms. Bruce may have fallen on

or rolled over on the hair that was in the area. A detailed understanding of the events that occurred during the assault on Ms. Bruce, and subsequently during the investigation of the scene, is required to understand how the hair found on Ms. Bruce's abdomen came to be in that location.

If there was a struggle or assault resulting in movement of Ms. Bruce or the perpetrator around the crime scene, in which there are a large number of hairs, then coming into contact with any of those hairs could have resulted in the hair ultimately being found on Ms. Bruce's abdomen. When, during the course of the investigation, the hair was actually observed and recovered must also be considered. If the hair was seen and recovered before any disturbance to the body, for example by individuals who first found the body, responding police officers, paramedics, crime scene investigators, or removal personnel, then it can be assumed that the hair was on Ms. Bruce's abdomen where it was found after the incident was completed. On the other hand, if the body was turned over, wrapped in a sheet placed on the floor for removal, or otherwise potentially contaminated by objects on the floor of the crime scene, then the relevance of the hair is reduced. Presumably, written and photographic documentation exists which establish where and when the hair was recognized as evidence and how it was collected.

The other pubic hair was found somewhat remote from Ms. Bruce and attached to an object that is associated with the defendant's job. It is unlikely that

the valve core and the hair were brought to the scene separately and somehow became associated during the incident. It seems more likely that the hair and the valve core became associated on some occasion unrelated to the homicide. (For example, when Mr. Holtzer happened to have a valve stem in his pocket and inadvertently transferred a hair into the pocket which then became associated with the valve stem). The two were then dropped either in the office or possibly elsewhere and brought into the office. There is no reason to believe that this occurred during the homicide. Although the hair and valve core could have been dropped during a struggle, the location of the hair and valve core some distance from the nexus of the struggle seems to suggest otherwise.

Since there is no evidence that the sequence of events resulting in Ms. Bruce's death started in Mr. Holtzer's apartment, the finding of one of her hairs in that apartment cannot be associated with the homicide. The hair may have been shed by Ms. Bruce on some previous occasion when she was in the apartment, or may have been shed elsewhere in the Beach Condominiums and transferred to the apartment by another person.

Other hair recovered

In addition to the three hairs whose origin have been established, a number of other hairs were recovered during the investigation of the crime scene as well as the defendant's apartment. It is not clear

which, if any of these hairs have been subjected to DNA typing for definitive proof of their origin, but certainly most of these hairs could not be from either the perpetrator (in the case of hairs at the scene) or Ms. Bruce (in the case of hairs from the apartment). It seems clear that the investigators in this case made efforts to collect all of the hairs at the scene, while making little effort to determine which, if any, of the hairs could be associated with the perpetrator or otherwise have some probative value.

Once all of the hairs had been collected, some decisions had to be made as to which ones should be subjected to various laboratory examinations. Obviously, the pubic hair on the victim's abdomen is of interest. The hair attached to the valve core is less likely to be relevant unless the valve stem itself is considered relevant. Furthermore, since there is no indication that the crime occurred in the defendant's apartment, or that any activity related to the crime occurred there, the relevance of any hair found there is limited.

The initial examination of all of the hair evidence was done using microscopy. Some hairs, at least the three identified as Mr. Holtzer's and Ms. Bruce's, were then sent for DNA analysis. It is not clear why those hairs were selected – especially the hair from the bedroom and the hair from the valve core. It seems likely that there were other hairs at the crime scene that could have been left there by the perpetrator. Whether or not these hairs were compared

with other potential suspects, or determined to be relevant or not to the incident, is not known.

The blood evidence

The description of the room in which the body was found suggests that the attack occurred primarily in that area. Whether or not the attack may have started in some other area of the facility, or proceeded into and out of that area at some point, is not clear from the information provided. In any event, it seems clear that there was a significant attack in the room in which the body was found, resulting in much shed blood in that room. Enough blood was apparently shed to produce recognizable shoe prints from someone who stepped in the blood.

Tests for blood using luminol conducted in the defendant's apartment must be considered only presumptive for blood and are normally only used where there is no visible blood stain. These tests indicate the possibility of blood being in an area, and the fact that blood is present must be confirmed by some additional test or tests. The luminol reaction is subtle, occurs in the absence of blood (autoluminescence) if the reagent is not applied judiciously, and is subject to a variety of false positive reactions. It is not clear from the information provided if any of the areas which gave a positive luminol reaction were shown to be blood stains by further laboratory testing.

Presumably, blood stains in the defendant's apartment would have been produced by someone walking with bloody shoes from the crime scene to the apartment. One would not expect that blood picked up on shoes, or bare feet, at the crime scene would survive more than a few steps. To have enough blood on shoes or feet to produce a stain which soaked through a rug or carpet, as described in the Laboratory Reports and accompanying notes seems entirely improbable.

CONCLUSIONS

There is no evidence that the pubic hair on the victim's abdomen, or the pubic hair on the valve core, are a consequence of the assault on Ms. Bruce.

There is no evidence that the hair of Ms. Bruce's found in Mr. Holtzer's apartment is related to events resulting in the death of Ms. Bruce.

Any of the hairs found at the crime scene could have been left by the perpetrator. Likewise, hair from other individuals who had been in that room on previous occasions, or hair from other areas in the facility which had been transported into that room, could have ended up on Ms. Bruce during the course of the incident, or post-incident activity.

The nature of the premises in which this incident occurred provides an opportunity for hairs to be transferred from one area of the facility to another. The fact that both Mr. Holtzer and Ms. Bruce were

present at the facility for an extended period of time prior to the homicide means that there was ample opportunity for both of them to shed hairs within the facility, and for those hairs to be moved around the facility.

It is unlikely that enough blood from the crime scene could have been transferred on the perpetrator's shoes to result in a stain soaking through a carpet or rug in Mr. Holtzer's apartment.

Submitted this 1st Day of December, 2004,

/s/ Peter Barnett
Peter D. Barnett, D-ABC
Criminalist

APPENDIX D
CURRICULUM VITAE
Peter D. Barnett

SUMMARY

Professional practice concentrates on the physical, chemical and microscopical examination of physical evidence particularly trace evidence (hairs, fibers, etc.), impression evidence (fingerprints, documents, tool marks), field investigation (scene documentation, evidence collection), firearms examinations (including muzzle distance determination, trajectory reconstruction), and incident reconstruction.

- *Employment*
- *Education*
- *Experience*
- *Professional Affiliations*
- *Certifications*
- *Technical Papers*
- *Awards*
- *Other Activities*
- *Personal*
- *Contact Information*

EMPLOYMENT

PARTNER, Forensic Science Associates, 1978-present

CONSULTING CRIMINALIST, 1971-present

CRIMINALIST, Paul L. Kirk & Associates, Berkeley, California, July 1969-January 1971

CRIMINALIST, San Diego Police Department, San Diego, California, July 1968-July 1969

EDUCATION

Graduate work in Criminalistics, University of California, Berkeley, 1969-1970

Bachelor of Science in Criminalistics, University of California, 1968

Attended San Francisco State University, September, 1965-June, 1966, Major: Chemistry

Attended University of California, Berkeley, September 1962-January 1964, Major: Chemical Engineering

Attended University of Redlands, Redlands, California, September 1960-June 1962. Major: Engineering

---

EXPERIENCE

Experienced in the examination and analysis of physical evidence including field and laboratory examination of all types of physical evidence and investigation of a variety of types of crime and accident scenes. With the San Diego Police Department, responsibilities included crime scene investigation, laboratory examination of evidence such as narcotics, blood samples (for alcohol and drugs), firearms, physiological fluid samples, trace evidence comparison (fibers, paint, hair, etc.), supervision of laboratory technicians, training of police officers, etc.

Consulting assignments beginning in 1969 with Paul L. Kirk and Associates have included a wide variety of incidents and many different types of physical evidence. Typical field assignments involve inspection

of incident scenes, documentation and collection of physical evidence from those scenes, and the reconstruction of the incident. Typical laboratory assignments include examination of clothing for relevant physical evidence, examination of firearms and related forensic ballistic problems, trace evidence examination (hair, fibers, glass), document examination (handwriting, typewriting, ink comparison, altered or obliterated documents, FAX or photocopied documents, anonymous documents), and fingerprint examinations. Types of cases included death investigation (homicide, suicide, or accidental), assaults, automobile or other types of accidents, slip/trip and fall, industrial accidents, and personnel matters.

Consultation can be provided in preparing for the cross examination of expert witnesses, location of experts in specialized fields, and overall review of the physical evidence and technical aspects of pending litigation.

Clients include Private attorneys, public defenders, district attorneys, law enforcement agencies, corporations, insurance companies, unions, independent insurance adjusters, and private individuals.

Qualified as an expert witness in Superior Court in numerous counties of the State of California as well as in Nevada, Texas, Alaska, Washington, Oregon, Arizona, Colorado, Oklahoma, Hawaii, and Federal and Military Courts as well as Administrative hearings (DMV, NLRB). Have presented expert testimony regarding questioned documents examination, auto

accidents, product liability, firearms and ballistics, physiological fluids, trace evidence, reconstruction of accident and crime scenes, and examination of various other types of physical evidence.

PROFESSIONAL AFFILIATIONS

Fellow, American Academy of Forensic Sciences (Criminalistics Section)

Member, California Association of Criminalists

Member, American Society for Testing and Materials

Forensic Science Society, Great Britain (Affiliate)

CERTIFICATIONS

Diplomate, American Board of Criminalistics

BOOKS

Ethics in Forensic Science: Professional Standards for the Practice of Criminalistics, New York: CRC Press (2001)

"Criminalistics," in *McGraw-Hill Encyclopedia of Science and Technology 9th Editiong,* McGraw-Hill Companies, 2002.

TECHNICAL PAPERS

Whalley, R., and Barnett, P.D., **Legal vs. Forensic Definition of Under the Influence**. Presented at the 33*rd* Semi-Annual Seminar of the California Association of Criminalists, May, 1969.

Barnett, P.D., and Berger, R., **The Determination of the Age of Latent Fingerprints**, *J. Forensic Science Society*, 16 (1977) 249.

Barnett, P.D., **Trace Elements Analysis of Heroin by X-Ray Fluorescence**. Presented at the 47*th* Semi-Annual Seminar of the California Association of Criminalists, May, 1976.

Barnett, P.D., **Comparison of Edges of Paper from Pads**. Presented at the 54*th* Semi-Annual Seminar of the California Association of Criminalists, October, 1979.

Barnett, P.D., **Probabilities and Human Hair Comparison**. Presented at the 55*th* Semi-Annual Seminar of the California Association of Criminalists, May, 1980.

Barnett, P.D., and Ogle, R.R., **Examination of Headlamp Filaments**. Presented at the 56*th* Semi-Annual Seminar of the California Association of Criminalists, October, 1980.

Barnett, P.D., Blake, E.B., and Ogle, R.R., **The Role of the Defense Expert**. Presented at the American Academy of Forensic Science, Los Angeles, California, February, 1981.

Barnett, P.D., and Ogle, R.R., **Probabilities and Human Hair Comparison**, J. *Forensic Science*, 27 (1982):272-278.

Barnett, P.D., **The Utility of On-Line Searching in the Crime Laboratory**. Presented at the 58*th* Semi-Annual Seminar of the California Association of Criminalists, October, 1981.

Barnett, P.D., and Hurley, N.M., **Reconstruction of a Shotgun Shooting**. Presented at the First Inter-American Congress of Forensic Sciences, Sacramento, California, November, 1982.

Barnett, P.D., **A Systematic Approach to Trace Evidence**. Presented at the 61*st* Semi-Annual Seminar of the California Association of Criminalists, May, 1983.

Barnett, P.D., **Trace Evidence Examination – A Rapid Examination and Classification Scheme**. Presented at the American academy of Forensic Science, February, 1984.

Barnett, P.D., **Interpretation of Trace Element Composition of Bullet Lead**. Presented at the 63*rd* Semi-Annual Seminar of the California Association of Criminalists, May, 1984.

Barnett, P.D., **Strong Negative Conclusions in Hair Comparison – A Rare Event**. Letter to the Editor, *J. Canadian So. Forensic Science* 18(2): 69-70, June 1985.

Barnett, P.D., **Ethical Considerations in the Practice of Forensic Science**. Presented at the 192*nd* National Meeting, American Chemical Society, September 9, 1986, Anaheim, CA.

Barnett, P.D., and Blake, E.T., **Microscopic Comparison of Human Head Hair, Results of a**

Blind Trial Experiment. Presented at Inter-Micro-86, Chicago, IL, July 24, 1986.

Barnett, P.D., and Super-Mihalovich, J., **Ricochet of Bullets from Automobile Windshields**. Presented at the 73*rd* Semi-Annual Seminar of the California Association of Criminalists, Sacramento, CA, May, 1989.

Barnett, P.D., **The Examination of Hanging Chads in Election Ballots**. Presented at the 73*rd* Semi-Annual Seminar of the California Association of Criminalists, San Mateo, CA, May 1989.

Barnett, P.D., and Bagatelos, P.S., **Examination of Ballots in Contested Elections: Hanging Chads, Identifying Marks and Alterations**. Presented at the American Academy of Forensic Science Annual Meeting, February 22, 191 [sic], Anaheim, CA.

Barnett, P.D., **Microscopy of Foreign Bodies from Body Cavities**. Presented at Inter-Micro 92, Chicago, IL, July 13-16 1992.

Bowman, D., and Barnett, P.D., **Deterioration of Fibers in an Aquatic Environment: Preliminary Observations**. Presented at Inter-Micro 92, Chicago, IL, July 13-16, 1992.

Barnett, P.D., **Application of Multilinear Events Sequencing (MES) Analysis to the Reconstruction, of a Shooting Incident**. Presented at the 83*rd* Semi-Annual Seminar of the California Association of Criminalists, Oakland, CA, May 1994.

Barnett, P.D., **Current Status and Activities of ASTM Committee E-30 On Forensic Science**. Presented at the 83*rd* Semi-Annual Seminar of the

California Association of Criminalists, Oakland, CA, May 1994.

Barnett, P.D., **The Role of Standards in Forensic Science**, *Standardization News*, 23:24-27, April 1995.

Barnett, P.D., **Standards Needs in Forensic Science**. Presented to a seminar at the National Institute of Standards and Technology, Gaithersburg MD, June 15, 1995.

Barnett, P.D., and Shaffer, S.A., **Forensic Science on the Internet**. Presented at the 85*th* Semi-Annual Seminar of the California Association of Criminalists, Walnut Creek, CA, May, 1995.

Barnett, P.D., **Methodological Approach to Crime Scene Investigation: The Dangers of Technology**, in Hicks, John, et al. Forensic Evidence Analysis and Crime Scene Investigation, *SPIE Proceedings*, Vol. 2941, 1997, pp. 102-108.

Barnett, P.D., **The American Board of Criminalistics Certification Program for Criminalists Specializing in Trace Evidence Examination**. Presented at the Joint Seminar of the California Association of Criminalists and the Forensic Science Society, Harrogate, England, July, 1997.

Barnett, P.D., **Identification of Shoe Impressions from a Double Amputee: Is It Possible?**. Presented at the Joint Seminar of the California Association of Criminalists and the Forensic Science Society, Harrogate, England, July, 1997.

Barnett, P.D., and Shaffer, S.A., **Digital Discovery – How to Provide It and How to Use It**. Presented

at the 91*st* Semi-Annual Seminar of the California Association of Criminalists, Monterey, CA, May, 1998.

Barnett, P.D., **Comparison of Synthetic Fiber Types in Vacuum Debris from Different Households**, presented at InterMicro-98, Chicago, IL, August 12, 1998

Barnett, P.D., **Evaluation of the Significance of Trace Evidence: Three Cases**, presented at the Canadian Society of Forensic Sciences Meeting, Wolfville, Nova Scotia, August 16, 1998

Barnett, P.D., **History of the San Francisco Microscopical Society**, presented at InterMicro-99 June 28 – July 1, 1999, Chicago, IL

Barnett, P.D., **Future of Hair Microscopy**, panel discussion at InterMicro-99, June 28-July 1, 1999, Chicago, IL

Barnett, P.D., **Microscopy in Criminalistics: Past, Present and Future**, presented at the 1999 Pacific Conference on Chemistry and Spectroscopy, Ontario CA, October 6-8, 1999

Barnett, P.D., **Reconstruction of the Shooting of a Dog**, presented at the 94th Semi-annual Seminar of the California Association of Criminalists (Ontario CA, October 14-16, 1999)

Barnett, P.D., **The Role of Forensic Science Professional Organizations in the New Mellenium**, presented at the 94th Semi-annual Seminar of the California Association of Criminalists (Ontario CA, October 14-16, 1999) and at the meeting of the Forensic Science Society, (Nottingham, England, November 5-7, 1999)

Barnett, P.D., **Culinary Forensics: Investigation of a Pizza**, presented at the 99th Semi-annual Seminar of the California Association of Criminalists (San Francisco, CA, May 9-11, 2002)

Barnett, P.D., **Fact or Fiction: The Forensic Laboratory Report**, presented at the Forensic Science and Fiction, Joint Seminar of the Forensic Science Society and the California Association of Criminalists (Oxford, England, March 19-22, 2003)

Barnett, P.D., **The Dropped Card: The Consequences of Not Playing with a Full Deck**, presented at the Joint Seminar of the Joint Seminar of the Northwest Association of Forensic Scientists and the California Association of Criminalists, (Reno, NV, April 8-11, 2003)

Barnett, P.D., **Obscuring the Obverse: The Obligations of Disclosure**, presented at the Annual Meeting of the American Academy of Forensic Sciences (Dallas, TX, February 16-21, 2004)

AWARDS

California Association of Criminalists Service Award – 1977

California Association of Criminalists Outstanding Service Award – 1984

California Association of Criminalists Distinguished Service Award – 1989

California Association of Criminalists Distinguished Member Award – 1992

OTHER ACTIVITIES

Moderator, Panel Discussion on "Ethics in Forensic Science" at American Academy of Forensic Science Annual Meeting, 1984

Moderator, Special Session on "Applications of Computers in Forensic Science", American Academy of Forensic Science Annual Meeting, 1987

Editorial Secretary, California Association of Criminalists, 1985-1989

Membership Secretary and Criminalistics Subcommittee Chairman, ASTM Committee E-30 (Forensic Science) 1989-1991

Chairman, ASTM Committee E-30 (Forensic Science) 1991-1993

Chairman, Hair and Fiber Peer Group, American Board of Criminalistics/California Association of Criminalists – 1991 to present

Member, Board of Examiners, American Board of Criminalistics

President-Elect, California Association of Criminalists, 1995-1996

President, California Association of Criminalists, 1996-1997

PERSONAL

Born May 22, 1943 in Pasadena, CA, married, 2 children

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APPENDIX E

HOLTZER FACT STATEMENT ON HAIR TRANSFERENCE

On October 21, 1999, Kevin C. Holtzer, was convicted of first degree murder (MCL 750.316) in the beating death of Kaylee Bruce at the Beach Condominiums in Traverse City, Michigan on February 16, 1998. Three pieces of hair were the subject of extensive hearings on the propriety of mitochondrial DNA analysis by two (LabCorp and Mitotyping) labs, at least one of which was running validation studies at the time the hairs in question were being analyzed. Over defense objection the hairs were admitted against Kevin Holtzer at trial and became the primary convicting evidence against him.

The three hairs consisted of two pubic hairs found in the office area of the Beach Condominiums, where Bruce's body was found, which were claimed to contain DNA consistent with that of Appellant Holtzer, and one head hair found in Appellant Holtzer's condominium unit found to contain DNA consistent with that of the victim, Bruce. One of the pubic hairs claimed to be consistent with Holtzer was claimed to have been found attached to a spent tire valve core. Mr. Holtzer worked at a tire store.

A number of hairs were found on Holtzer's clothing, including two pubic hairs. These were found to be dissimilar to Holtzer and Bruce (T 10/14/99 67-69). One of two pubic hairs found could have belonged to Holtzer but neither matched Bruce (T 10/14/99 69).

Other hairs, head and pubic, found in Holtzer's condo unit, in the drain and on the floor mat, did not match Bruce (T 10/14/99 69-73). Lots of hairs from Holtzer's vehicle were examined and none of them were similar to Bruce (T 10/14/99 74). 50-75 hairs were collected from Holtzer's bathtub drains and none were found to be similar to Bruce (T 10/14/99 74-75). 50-60 hairs were collected from Holtzer's sink drain and none were found to be similar to Bruce (T 10/14/99 75). 50-60 hairs from Holtzer's dryer and 25-30 from his washer agitator were examined and none were found to be similar to Bruce (T 10/14/99 76).

After the murder, a "whole bunch of hairs" were collected from "body wraps,"[1] including two pubic hairs which could not be matched to either Holtzer or Bruce and at least one other hair that did not match either Holtzer or Bruce (T 10/14/99 77-79). None of these hairs were matched to Holtzer.

Of the two pubic hairs found in the room where the body was found (one was allegedly found on Bruce's torso), only one was sent on to a second lab (Mitotyping) for confirmation of mtDNA results after

---

[1] The body wraps were clean sheets that were used to wrap the body of the deceased (T 10/12/99 98). While the source of these sheet is not clear it is likely that sheets borrowed from the Beach Condominiums were utilized as detectives described borrowing and using sheets from the Condominiums to perform other crime scene functions at and around the location where the body was discovered (T 10/12/99 23-24).

extensive hearings revealed severe problems with the testing at the first lab (LabCorp) (T 10/15/99 129).

Mr. Holtzer had been living in a monthly rental unit at the Beach Condominiums for nearly three months at the time of Bruce's death, having moved in on November 20, 1997 (T 10/11/99 303). His unit (106) was entered on a daily basis by housekeeping personnel at the Beach Condominiums in order to exchange towels and to remove the garbage. Once a week the unit was thoroughly cleaned (including vacuuming and mopping of the floors) (T 10/13/99 43).

The pubic hair that was attached to a tire valve core[2] was found in an area of the utility room (behind the front desk) of the Beach Condominiums separate from the body of Bruce. It was found to the left of the doorway while Bruce's body was "around on the opposite side of the door (T 10/12/99 38-39). The hair was separated from the valve core at the lab and the technician who did the separation could not say "whether it was pinched in there, or stuck by blood, but it was attached to it."[3]

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[2] A detective testified that the valve core at issue was a common item readily available from a variety of retail outlets: "they all basically look alike" (T 10/12/99 115-116).

[3] It seems apparent from this account that the evidence technician who found the pubic hair attached to the tire valve core could not determine whether there was any agent at all causing the two items to be attached, as the hair could have been "pinched" into the core. The mention of blood, in the absence of any serological analysis, or even any analysis to determine if

(Continued on following page)

The office area and utility room where Kaylee Bruce worked and where her body was found was regularly utilized by employees, including housekeeping staff, as the time clock was in this area and employees would punch in and punch out (T 10/11/99 281). The utility room contained a small "freezer" unit and coffee supplies and would presumably be regularly visited by employees who wished to obtain access to these items (T 10/12/99 12). The time clock utilized by employees was located in the same room (utility room with water heater) where Bruce's body was found (T 10/11/99 285; 298; 10/12/99 29). Five to seven different employees handled cleaning chores at the Beach Condominiums and the employee assigned to handle cleaning chores in Mr. Holtzer's unit would change from day to day (T 10/13/99 48).

Kaylee Bruce had repeated personal contact with Mr. Holtzer (T 10/11/99 295-297). Holtzer would often lock himself out of his room and at times "someone would walk him down with the master key" to let him in. It was likely that Kaylee Bruce had to perform this service for Holtzer in the course of her employment at the Beach Condominiums (T 10/11/99 304-306).

During pretrial hearings in this case the trial court stated:

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any agent caused the hair to be stuck to the valve core, was highly prejudicial and apparently without basis in fact.

"[O]ne would not expect the victim's hair to be in the Defendant's condominium, so that had some probative value . . . and the pubic hair at the scene of the crime was said to have a sequence the same as the Defendant's, and, obviously, one would not expect to have his DNA at the scene of the crime, that would have probative value . . . " (MT 6/10/99 36).

APPENDIX F

U.S. Department of Justice
National Institute of Justice

Sourcebook in Forensic Serology, Immunology, and Biochemistry

R.E. Gaensslen, Ph.D.
Professor of Forensic Science
University of New Haven
West Haven, Connecticut

August 1983

**For sale by the Superintendent of Documents,
U.S. Government Printing Office
Washington, D.C. 20402**

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* * *

apparently been known for some time. Hunt *et al.* (1960) mention that the manufacture of Analar Benzidine was discontinued in 1951 for that reason. Camps (1976) notes that phenolphthalin has replaced benzidine in routine practice. Rentoul and Smith (1973), in the 13th edition of *Glaister's Medical Jurisprudence and Toxicology*, suggest a saturated solution of amidopyrinc in 95% ethanol as a benzidine replacement. (See Section 6.6.8). Apparently, therefore, the use of benzidine has been largely discontinued in

England. Higaki and Philp (1976) carried out their study of the phenolphthalin test (see Section 6.3) primarily to check its applicability as a substitute for the benzidine test, suggesting that benzidine has been abandoned in Canada as well.

In this country, the use and manufacture of benzidine has become subject to extremely stringent restrictions and controls, according to regulations issued by the Occupational Safety and Health Administration of the Department of Labor (Code of Federal Regulations, 1976). While manufacture and use have not been ordered to cease, the regulations and restrictions are prohibitively involved for a laboratory doing routine work. Regardless of the merits of the test, or the qualifications that should or should not be place on interpretation of the results obtained with it in medico-legal cases, it is probable that the substance will shortly be unavailable. Supervisors will probably be increasingly unwilling to place their examiners at risk by continued use of the reagent, and the OSHA Regulations may also be sufficiently constraining that manufacturers will consider them prohibitive as well. It is likely, therefore, that the benzidine literature will shortly become a part of the archives of this field.

6.5 Leucomalachite Green and Leucocrystal Violet Tests

The use of the leuco base of malachite green as a blood testing reagent was first reported by Adler and

Adler (1904), as noted above. The term "leuco compound", or in this case, "leuco base", comes from the literature of biological stains and dyes (Lillie, 1969). Compounds to be employed as stains or dyes obviously have to be colored. Although they differ greatly from one another chemically, all contain a chromophore group, a structure which renders them colored. They all share in common additionally the property of being reducible and reduction alters the chromophore group rendering the compound colorless. These colorless reduction products are referred to as "leuco compounds". Clearly, the leuco compound are oxidizable to the dye forms. The "Leuco bases" are particular types of leuco compounds, usually carbinols, and characteristic of the triphenylmethyl derivatives.

In the original work, the Adlers used leucomalachito green and leucocrystal violet, in addition to benzidine, for blood detection in aqueous solution. The structures of crystal violet (hexamethylpararosanilin) and malachite green are shown in Figs. 6.5 and 6.6, respectively. Only the leuco base of the latter has been widely used in forensic practice. The leucomalachite green test had a sensitivity limit, like benzidine, of $1{:}10^5$ dilution of blood. Michel (1911a) recommended this test and said that it was more sensitive then phenolphthalin. Von Fürth (1911) utilized the test on bloodstain extracts prepared by digesting the bloodstained material with 50% KOH in ethanol, and extracting that solution with pyridine. The test was then performed on a piece of filter paper, moistened with the pyridine extract. Medinger (1933) strongly

recommended the reagent, and tested various physiological fluids, plant extracts and inorganic compounds, all with negative results, provided the peroxide was added in a second step after no color had developed in the presence of reagent alone.

[Figure 6.5 Crystal Violet Omitted in Printing]

White (1977) showed that leucocrystal violet was as sensitive in detecting iron (III) mesoporphyrin IX as a spot on filter paper as tetramethylbenzidine, guaiacum and aminodiphenylamine.

Alvarez de Toledo y Valero (1935) review the test rather extensively, and tested a large number of organic and inorganic compounds for false positive reactions. He found that there are many chemical oxidants that will give the reaction in the absence of peroxide, as well as some that catalyze the reaction in its presence in much the same manner as does blood. The test is, therefore, [illegible] specific for blood than most of the other catalytic tests.

[Figure 6.6 Malachite Green Omitted in Printing]

The sensitivity of the test was originally reported to be $1:10^6$ dilution of blood by Adler and Adler (1904). Alvarez de Toledo y Valero (1935) reported the same value, but Nicolesco (1934) quoted the sensitivity as a 1:20,000 dilution of blood. Alvarez de Toledo y Valero noted that more dilute solutions of blood required longer times for color development, 1:1000 dilutions being instantaneous, 1:2,000 dilutions requiring 15-20 sec. and so on until 55 sec was necessary at $1:10^6$

dilutions and 25 min was needed for 1:2 X 10^6 dilutions. Grodsky *et al.* (1951) reported that stains made from 1:10^5 dilutions of blood came up in 15 sec, using a reagent prepared by dissolving 0.1 g leucomalachite green and 0.32 g sodium perborate in 10 m*l* of 2:1 (v/v) glacial acetic acid in water. The benzidine test on the same sample, by contrast, came up in 1 sec. Hunt *et al.* (1960) similarly reported leucomalachite green to be less sensitive than benzidine, and apparently more specific. But the apparent increase in specificity was attributed to the lower sensitivity, and was thus not considered an advantage.

6.6 Other Catalytic Tests

Over the years a number of catalytic tests have been proposed for the detection of blood in stains, or of blood in feces or urine, which have enjoyed only limited use, or about which there is not a great deal of literature. All these tests are briefly discussed together in this section.

6.6.1 Peroxide

It should be mentioned that peroxide was sometimes used as a reagent for blood detection, especially in the older literature. That blood possessed a peroxidase activity, and acting as a catalase was thus capable of evolving oxygen from peroxide, has been known since the experiments of Schönbein (1863). All the catalytic tests are based on

this principle, as discussed in the preceding sections; but all have relied upon the coupling of the peroxidase activity to the oxidation of a compound which formed a colored product.

Zahn (1871) specifically noted that peroxide could be used to detect blood in stains, though it is not clear that he was aware of Schönbein's work. If peroxide is brought into contact with a bloodstain the peroxidase reaction takes place after a minute or so, and is evidenced by the formation of large numbers of tiny bubbles. Gantter (1895) suggested that the test had substantial value if negative, i.e., was a good indication of the absence of blood. Sutherland (1907) referred to the test as the Zahn-Gantter Test, and noted that many of the substances now known to give false positive catalytic tests, such as vegetable extracts, gave this test as well. Cotton (1904) studied the evolution of oxygen in the presence of H_2O_2 from the blood of a number of different species. Palleske (1905b) also conducted studies on the test with different bloods. A positive test could be obtained with a drop of blood in 1500 m*l* of water, which, if we assumed that 20 of his drops would equal 1 m*l*, would represent a sensitivity of a 1:30.000 [illegible]. Sutherland (1907) thought the test was useful [illegible] negative, except where the stain had been heated above 120°. Leers (1910) presented the test as a presumptive one, noting that other substances than blood gave positive results. He called the test "Die Vorprobe mit Wasserstoffsuperoxyd" or, simply "the preliminary test with hydrogen peroxide."

6.62 Eosin

In 1910, Ganassini proposed the use of an cosin reagent, prepared from crystalline eosin by heating in strong base, and collection and washing the acid precipitate. This reagent in alcoholic solution in the presence of strong alkali and H_2O_2 gave a momentary yellow to red colored product. He believed the reagent to be specific for blood. Belussi (1911) disagreed, noting that other substances gave positive tests, and the sensitivity of Ganassini's test was far lower than that of benzidine.

6.6.3 2,7-Diaminofluorene

There is a brief report in the literature by Schmidt and Eitel (1932) on blood identification using 2,7-diaminofluorene (also called 2,7-fluorenediamine). This report has mainly to do with a problem concerning the stability of the reagent, but the implication that the reagent was in use for the detection of blood is quite clear. The structure of 2,7-diamonofluorene is indicated in Fig. 6.7. The 7th edition of the *Merek Index* indicates that the reagent is used to determine halides, nitrate, persulfate and several metals. It seems likely, therefore, that these might be expected to give false positive reactions in the test for blood using this reagent.

[Figure 6.7, 2,7-Diaminofluorene
Omitted in Printing]

6.6.4 Rhodamine B

In 1917, Fuld recommended the use of a Rhodamine B reagent for blood detection. The reagent was prepared from Rhodamine B (Fig. 6.8) by reduction in base in the presence of zinc. This reagent detected blood at a dilution of $1:10^7$, according to Fuld. Alke (1922) studied the reaction in some detail, and reported that it is not given by semen, saliva, urine or a number of other biological substances. The usual inorganic oxidants will oxidize the reagents in the absence of H_2O_2. The reaction was negative with rust, and Alke reported a sensitivity limit of $1:10^5$ to $1:10^6$ dilution of blood. Zicmke (1938) notes that an investigator named Diels showed that chlorophyll gives the test. The reaction is apparently still positive with blood which is putrefied, or which has been heated above 200°.

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